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No. _____

IN THE

Supreme Court of the United States

October Term, 1982

GEORGE D. BUSBEE, *et al.*,
Appellants,

v.

WILLIAM FRENCH SMITH, *et al.*,
Appellees,

WILLIAM C. (BILLY) RANDALL, JR., *et al.*,
Appellee-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. QUESTIONS PRESENTED BY THIS JURISDICTIONAL STATEMENT

A. Whether a Congressional reapportionment plan that has no discriminatory effect, that enhances black voting strength, and that provides blacks with equal access to the political process can be deemed to violate Section 5 of the Voting Rights Act.

B. Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.

II. QUESTION ALSO TO BE PRESENTED IF PROBABLE JURISDICTION IS NOTED

Whether the District Court's finding of discriminatory purpose must be set aside because it is based on an erroneous view of the controlling legal principles and on underlying factual findings that are clearly erroneous.

PARTIES

The parties to this Appeal are George D. Busbee, Governor of the State of Georgia; Zell Miller, Lieutenant Governor of the State of Georgia; Michael J. Bowers, Attorney General of the State of Georgia; Thomas B. Murphy, Speaker of the Georgia House of Representatives; and the State of Georgia, as Appellants; William French Smith, Attorney General of the United States; William Bradford Reynolds, Assistant Attorney General of the United States; and the United States of America, as Appellees; William C. (Billy) Randall, Jr.; J. E. (Billy) McKinney; Douglas Dean; Julian Bond; Horace Tate; Alveda King Beal; Lorenzo Benn; Tyrone Brooks; J. C. Daugherty, Sr.; Bob Holmes; David Scott; Hosea L. Williams; R. A. Dent; Calvin Smyre; Sanford D. Bishop, Jr.; David E. Lucas; Bobby L. Hill; John White; Raymond Brown; J. J. Jones; and Duane McMahon, as Appellee-Intervenors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

SUBSTANTIALITY OF THE QUESTIONS PRESENTED 10

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT 10

A. The District Court's holding—that a reapportionment plan that does not have a discriminatory effect, that enhances black voting strength, and that does not deny blacks access to the political process can, nevertheless, violate Section 5 of the Voting Rights Act—is in direct and irreconcilable conflict with this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976) 10, 11

B. The District Court's holding—that a reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can, nevertheless, have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act—is in direct and irreconcilable conflict with this Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975) 16

TABLE OF CONTENTS (Continued)

Page

II. THE DISTRICT COURT'S FINDING OF DISCRIMINATORY PURPOSE SHOULD BE SET ASIDE BOTH BECAUSE IT IS BASED UPON AN ERRONEOUS VIEW OF THE CONTROLLING LEGAL PRINCIPLES AND ALSO BECAUSE IT IS BASED UPON UNDERLYING FACTUAL FINDINGS THAT ARE CLEARLY ERRONEOUS 23

III. THE ISSUES PRESENTED ARE SUBSTANTIAL 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974)..... 10

Beer v. United States, 374 F.Supp. 363 (D.D.C. 1974)..... 13

Beer v. United States, 425 U.S. 130 (1976).....*passim*

Burns v. Richardson, 384 U.S. 73 (1966)..... 15

City of Mobile v. Bolden, 446 U.S. 55 (1980).....19, 25

City of Richmond v. United States, 422 U.S. 358 (1975).....*passim*

De Gaster v. Dillon, 247 F.Supp. 511 (D.D.C. 1963)..... 21

Fortson v. Dorsey, 379 U.S. 433 (1965)..... 15

Gomillion v. Lightfoot, 364 U.S. 339 (1960)..... 18

Mammoth Oil Co. v. United States, 275 U.S. 13 (1927)..... 21

Mississippi v. United States, 490 F.Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).....24, 26

Pullman-Standard v. Swint, ___ U.S. ___, 72 L.Ed.2d 66 (1982)..... 23

Rogers v. Lodge, ___ U.S. ___, 73 L.Ed.2d 1012 (1982)..... 25

Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974)..... 22

United Jewish Organizations v. Carey, 430 U.S. 144 (1977)..... 25

Washington v. Davis, 426 U.S. 229 (1976)..... 12

Wesberry v. Sanders, 376 U.S. 1 (1964)..... 6

Whitcomb v. Chavis, 403 U.S. 124 (1971).....15, 19, 24

White v. Register, 412 U.S. 755 (1973).....15, 19

TABLE OF AUTHORITIES (Continued)

Page

Statutes

28 C.F.R. § 51.44 9

28 U.S.C. § 1253 3

28 U.S.C. § 2201 2

28 U.S.C. § 2284 2,4

42 U.S.C. § 1973c (1975) 1,2,3

Articles

Bacote, *The Negro in Atlanta Politics*, 16 Atlanta U. Rev. (Phylon) 333 (1955) 20

Hornsby, *The Negro in Atlanta Politics, 1966-1973*, Atlanta Hist. Soc'y Bull. (Spring 1977) 20

Walker, *Negro Voting in Atlanta, 1953-1961*, 24 Atlanta U. Rev. (Phylon) 379 (1963) 20

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Appellants, George D. Busbee, Zell Miller, Michael J. Bowers, Thomas B. Murphy, and the State of Georgia, hereby appeal from the order and opinion of the United States District Court for the District of Columbia entered in this proceeding on July 22, 1982, and thereby bring to this Court important questions concerning Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c (1975). Specifically, does Section 5 prohibit the legislative enactment of a Congressional redistricting plan that has no retrogressive effect on black voting strength, that in fact enhances black voting strength, and that does not have the purpose of diminishing the existing level of black

voting strength? More generally, does a State legislature's failure to maximize black voting strength evidence a purpose to deny or abridge the right to vote on account of race within the meaning of Section 5, where the legislature enacts an ameliorative electoral change? Never before has the Court reviewed a judicial denial of Section 5 preclearance where the electoral change at issue was found to enhance black voting strength. The resolution of these issues will affect every political subdivision covered by the Voting Rights Act of 1965.

OPINIONS BELOW

The opinion and order rendered by the United States District Court for the District of Columbia is not yet reported and appears as Part I of the Appendix hereto.

JURISDICTION

This appeal is taken from the July 22, 1982 order of a three-judge United States District Court for the District of Columbia denying Appellants a declaratory judgment that Georgia's 1981 Congressional reapportionment plan did not violate Section 5 of the Voting Rights Act of 1965. *See* Part I of the Appendix hereto. Federal jurisdiction was conferred by 42 U.S.C. § 1973c and 28 U.S.C. § 2201. The District Court was properly convened as a court of three judges under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

A Notice of Appeal was timely filed on July 26, 1982. *See* Part II of the Appendix hereto. A timely application for extension of time in which to docket the appeal was submitted to Honorable Warren E. Burger, Chief Justice of the Supreme Court and Circuit Justice for the District of Columbia Circuit, on September 3, 1982 and granted by order dated September 8, 1982. This Jurisdic-

tional Statement is being filed by November 23, 1982, the end of the time extension granted by Chief Justice Burger. *See* Rule 12 of this Court. The jurisdiction of this Honorable Court is invoked under 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1973c (1975):

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such quali-

fication, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

STATEMENT OF THE CASE

On March 8, 1982, Appellants filed an action in the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act of 1965, seeking a declaratory judgment that Georgia's 1981 Congressional reapportionment plan (Act No. 5, 1981 Extraordinary Session, hereinafter referred to as "Act No. 5") was enacted without the purpose or effect of denying or abridging the right to vote on account of race.

The focus of the litigation was the reapportionment of Georgia's Fourth and Fifth Congressional Districts pursuant to the 1980 Census. It is undisputed that the manner in which Georgia's other eight Congressional districts were drawn complies with the Voting Rights Act. Appendix at p. 43a, ¶6 [hereinafter cited as "App., __a"].

Under the 1972 apportionment plan for Georgia's ten Congressional districts, which was based on the 1970 Census, the black percentage of population in the Fourth and Fifth Congressional Districts was 14.69% and 44.15%, respectively.[1] The 1980 Census indicated that the deviation from the ideal population and the black proportion of the population for the Fourth and Fifth Congressional Districts (as those districts were established in 1972), were as follows:

District	Total Population	% Deviation	Black Population	% Black
4	543,954	− .45	150,798	27.72
5	420,470	−23.05	211,634	50.33

App., 3a, ¶5. Based on the 1980 Census, the population deviation of the Fourth District did not require any ad-

[1] Although these figures were not referred to in the District Court's July 22, 1982 opinion, they were the subject of a pretrial stipulation by counsel for all parties in this action.

justment to meet the one person-one vote rule of this Court. *See Wesberry v. Sanders*, 376 U.S. 1 (1964). However, the population deviation of the Fifth District was −23.05%, *i.e.*, 23.05% below the population of the ideal district. App., 3a, ¶5. Thus, it was necessary to substantially increase the population of the Fifth District in order to bring it within the allowable deviation. *Wesberry v. Sanders, supra.*

In order to reapportion Georgia's Congressional districts, Appellant Busbee convoked a special session of the Georgia General Assembly, App., 2a, ¶2, which established that, after the State legislature had reapportioned itself, the State Senate would initiate a Congressional reapportionment bill before referral to the State House. As shown below, the plan passed by the Georgia Senate on August 31, 1981 (S.B. 2 Ex.) had the effect of enhancing black voting strength in the Fifth Congressional District, but it also caused a substantial reduction of the black percentage of population in the Fourth Congressional District:[2]

District	Total Population	% Deviation	Black Population	% Black
4	550,789	+ .80	21,564	3.94
5	550,389	+ .73	379,842	69.01

The enhancement of black voting strength in the Fifth District under the Senate plan was achieved at the expense of radically disrupting the preexisting configuration of that district and at the additional expense of diluting black voting strength in the neighboring Fourth District.

The plan passed by the Georgia House of Representatives on September 2, 1981 (House Substitute to S.B. 2 Ex.) also enhanced black voting strength in the Fifth

[2] *See* note 1, *supra.*

Congressional District but did not diminish black voting strength in the Fourth Congressional District. Statistical data for the Fourth and Fifth Congressional Districts under the House Plan are as follows:[3]

District	Total Population	% Deviation	Black Population	% Black
4	543,954	− .45	150,798	27.72
5	548,686	+ .41	283,874	51.74

The House Plan left the percentage of blacks in the Fourth District unchanged from the preexisting apportionment plan while increasing the black proportion of the Fifth District population from 50.33% to 51.74%. This was accomplished by making no change to the boundaries of the Fourth District and by extending the southern boundary of the preexisting Fifth District southward, keeping all of the Fifth District within Fulton County, as it had been under the 1972 apportionment plan.

Because the House and Senate did not agree on a reapportionment plan, both chambers appointed a conference committee to achieve a compromise between the two plans. After six conference committees, the Georgia General Assembly enacted Act No. 5, providing for the reapportionment of Georgia's ten Congressional districts. The statistical data for Act No. 5 demonstrate that it significantly enhanced black voting strength in the Fifth Congressional District, while, at the same time, maintaining an influential level of black voters in the Fourth Congressional District:

District	Total Population	% Deviation	Black Population	% Black
4	549,846	+ .63	116,530	21.19
5	542,592	− .70	319,822	57.28

[3] *See* note 1, *supra*.

App., 3a, ¶4.

In order to achieve a population within the allowable deviation, Act No. 5 added 122,118 persons to the Fifth District. Of these additional individuals, 99,188, or 81.22% of the total population added, were black citizens. Based on 1980 Census statistics, Act No. 5 increased the black proportion of the voting age population in the Fifth District from 48% to 52%. Act No. 5 removed no census tracts having a majority black population from the Fifth District and added 16 full census tracts having majority black populations to the Fifth District. Act No. 5 removed three full census tracts and one partial census tract, each having a white population over 95%, from the Fifth District.[4]

On September 22, 1981, the Governor of Georgia approved the enactment of Act No. 5. App., 2a, ¶3. The State's submission of Act No. 5 pursuant to Section 5 of the Voting Rights Act of 1965 was received by the Attorney General of the United States on September 29, 1981. By letter dated November 27, 1981, Appellee Reynolds requested additional information, which was provided to Reynolds on December 23, 1981.

By letter dated February 11, 1982, Appellee Reynolds, on behalf of Appellee Smith, interposed an objection to Act No. 5 based entirely on the line drawn between the Fourth and Fifth Congressional Districts. No objection was interposed to the remaining eight Congressional districts. In his February 11 objection letter, Reynolds stated that, inasmuch as Act No. 5 increased the black population of the Fifth Congressional District from 50.3% to 57.3% "under *Beer v. United States*, 425 U.S. 130 (1976),

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[4] *See* note 1, *supra*.

the Plan must be considered one which 'enhances' the position of minorities in respect to their effective exercise of the election franchise and therefore cannot be said to have a racial 'effect' within the meaning of Section 5." Notwithstanding this admitted enhancement of black voting strength, Appellee Reynolds stated that he was unable to conclude that Act No. 5 did not have a discriminatory purpose with respect to the line drawn between the Fourth and Fifth Congressional Districts.

The State's request for reconsideration and withdrawal of the objection, pursuant to 28 C.F.R. § 51.44, was received by Appellee Reynolds on February 19, 1982. By letter dated March 3, 1982, Appellee Reynolds denied the request to withdraw the objection.

On March 8, 1982, Appellants filed this action for declaratory judgment and, on March 22, 1982, a group of black state legislators were granted permission to intervene as defendants. The trial was conducted on June 28-July 1, 1982.

On July 22, 1982, the three-judge District Court issued its decision on the merits. The District Court concluded that the reapportionment plan enhanced black voting strength and did not have a discriminatory effect under this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976). App., 44a, ¶7. Nevertheless, the District Court held that the line between the Fourth and Fifth Congressional Districts was drawn with a discriminatory purpose based primarily upon the finding that the Chairman of the House Reapportionment Committee made "overt racial statements" and attempted to minimize the enhancement of black voting strength. *See* App., 47a, ¶19. The District Court made no finding that black residents of the Fifth Congressional District were adversely affect-

ed by or had less opportunity to exercise their elective franchise under Act No. 5; nor did the District Court conclude that Act No. 5 was unconstitutional. The District Court denied the State's request for relief and enjoined the State from implementing its Congressional redistricting plan as such plan affects Georgia's Fourth and Fifth Districts. Additionally, the State was ordered to submit an alternative apportionment plan of the Fourth and Fifth Districts for District Court approval by August 11, 1982.[5]

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. THE DISTRICT COURT'S HOLDING—THAT A REAPPORTIONMENT PLAN THAT DOES NOT HAVE A DISCRIMINATORY EFFECT, THAT ENHANCES BLACK VOTING STRENGTH, AND THAT DOES NOT DENY BLACKS ACCESS TO THE POLITICAL PROCESS CAN, NEVERTHELESS, VIOLATE SECTION 5 OF THE VOTING RIGHTS ACT—IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS

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[5] Pursuant to the District Court's July 22, 1982 order, the State submitted and received court approval of a new apportionment of the Fourth and Fifth Districts. Although the order approving the new plan is not a subject of this appeal, the legislation enacting the new apportionment specifically states that it will become ineffective and will revert back to Act No. 5 upon a reversal of the District Court's decision by this Court. Therefore, the issues raised in this Jurisdictional Statement have not been mooted by the District Court's subsequent order approving a new provisional apportionment plan. A determination of the issues raised herein will decide which Congressional apportionment plan will be in effect in the State of Georgia for the balance of the current decade. *See, e.g., Beare v. Briscoe*, 498 F.2d 244, 245, n. 5 (5th Cir. 1974).

COURT'S DECISION IN *BEER V. UNITED STATES*, 425 U.S. 130 (1976).

The three-judge District Court concluded that Georgia's 1981 Congressional reapportionment plan as it affects the Fourth and Fifth Congressional Districts violates Section 5 of the Voting Rights Act of 1965 even though the plan enhances minority voting strength and has no discriminatory effect. Moreover, the District Court made no finding that black citizens in those districts are denied equal access to the political process. Indeed, the evidence clearly established that blacks living in the area encompassed by the Fifth District have enjoyed considerable influence in electing candidates of their choice. *See* pp. 19-22, *infra*.

The holding of the District Court is in direct and irreconcilable conflict with *Beer v. United States*, 425 U.S. 130 (1976) in which this Court explained the Section 5 test as follows:

> "When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . .' H. R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.
>
> "It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the elec-

> toral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless *the new apportionment itself* so discriminates on the basis of race or color as to violate the Constitution."

425 U.S. at 141 (footnote omitted; second emphasis added).

The District Court recognized that Georgia enhanced the black population in the Fifth District from 50.33% to 57.28% and that, therefore, there was "no retrogression" and the voting plan did "not have a discriminatory effect" under *Beer*. App., 44a, ¶7. In addition, the record is replete with evidence showing that no member of the Georgia General Assembly ever intended to reduce the black percentage of total population, of voting age population, or of registered voters below the percentage in the preexisting Fifth Congressional District. The lower court specifically found that Representative Joe Mack Wilson, the Chairman of the House Reapportionment Committee, whom the District Court characterized as a "racist," had no intent to create a new Fifth District which would reduce the proportion of black population below that found in the preexisting apportionment plan.[6]

[6] Although Appellants would dispute the District Court's findings that Representative Wilson is a "racist," it has been recognized by this Court that even though a particular individual may have been motivated by considerations which, if shared or adopted by the State, would result in an invalid act, that fact alone does not invalidate a collective act such as reapportionment. As Justice Stevens stated in his concurring opinion in *Washington v. Davis*, 426 U.S. 229, 253 (1976):

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compro-

App., 26a-27a, ¶77. Moreover, the District Court did not hold that "the *new apportionment itself* so di criminates on the basis of race or color as to violate the Constitution." *Beer v. United States, supra.* (Emphasis added.) Nevertheless, the lower court has become the first court ever to conclude that, in spite of the acknowledged enhancement of black voting strength, "Act No. 5 as it pertains to the Fourth and Fifth Congressional Districts has a discriminatory purpose in violation of Section 5." App., 47a, ¶19. No other case, either under Section 5, the Fourteenth Amendment, or, the Fifteenth Amendment, has reached such a result.

The underlying facts in the instant case are nearly identical to the facts in *Beer*. The electoral change at issue in *Beer* was the reapportionment of the City of New Orleans' councilmanic districts. The District Court found that the plan at issue had a discriminatory effect. *Beer v. United States*, 374 F.Supp. 363 (D.D.C. 1974). This Court reversed that decision.

In *Beer*, as in this case, the United States Attorney General objected to a redistricting plan because the predominantly black neighborhoods in New Orleans were located generally in an east-to-west progression and "the use of north-to-south districts in such a situation inevitably would have the effect of diluting the maximum potential of the Negro vote." *Beer v. United States*, 425 U.S. at 136. Justice Marshall noted in dissent that the inevi-

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mise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker *or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.*" (Emphasis added.)

table result of that plan's north-south orientation was to have districts in which blacks were generally in the minority or, at the most, in a bare majority. The District Court's opinion in the instant case follows the rationale of the lower court in *Beer* and Justice Marshall's dissent in *Beer*, 425 U.S. at 145-163. Justice Marshall noted that the black community in New Orleans was not widely dispersed, but rather was "collected in a concentrated curving band that runs roughly east-west" which was divided "like so many pieces of bologna" by the City's north-south apportionment plan. 425 U.S. at 161 (Marshall, J., dissenting). Similarly, the District Court below found that the black population in Fulton and DeKalb Counties is "concentrated in one contiguous area" which "separates the races in both counties on an east-west axis." App., 4a, ¶8. Justice Marshall, in *Beer*, found that none of New Orleans' proffered reasons for maintaining its councilmanic districts along a north-south axis was an acceptable justification for "diluting" the black vote, and noted that alternative plans that had been drawn with greater black percentages of population had been rejected, although they satisfied the City's principles of reapportionment. 425 U.S. at 162-163 (Marshall, J., dissenting). In the instant case, the District Court also rejected the State's proffered justifications for its reapportionment plan on the grounds that other options were available which could have created a Fifth District with an even higher black percentage of population. *See* App., 20a, ¶58; 38a, ¶110.

This Court held in *Beer* that an apportionment scheme which is non-retrogressive and enhances minority voting strength cannot violate Section 5 of the Voting Rights Act of 1965 unless the new apportionment so discriminates on the basis of race as to violate the Constitution.

In this case, as in *Beer*, there can be no rational contention that Act No. 5 suffers from any such constitutional infirmity.[7]

Act No. 5 "does not remotely approach a violation of the constitutional standards enunciated in those cases" in which this Court considered claims that legislative apportionments violated the constitutional rights of certain minorities. *Beer v. United States*, 425 U.S. at 142-143, n.14. For example, in *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971), this Court stated that proof of invidious discrimination violative of the Fourteenth Amendment in a redistricting context will result only where it is shown that a minority group will have less opportunity than other residents to participate in the legislative process and to elect legislators of their choice. *See also Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Burns v. Richardson*, 384 U.S. 73, 88-89 (1966); *White v. Register*, 412 U.S. 755, 766 (1973). In the instant case, a black was elected to Congress three times in the old Fifth District, and the new Fifth District is conceded to have enhanced black voting strength. In addition, during the past decade, blacks regularly offered their candidacies and were elected to offices in both Fulton County and the City of Atlanta, the areas generally encompassed by the old Fifth District and new Fifth District under Act No. 5. Thus, it is not possible to conclude that Act No. 5 cancels out black

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[7] In *Beer*, this Court noted:

"It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional. The United States has made no claim that Plan II [the City's apportionment plan] suffers from any such disability, nor could it rationally do so."

425 U.S. at 142, n. 14 (bracketed matter supplied).

voting strength in violation of the Constitution. As is discussed in Section B, *infra*, the evidence in the case at bar not only negated any contention that blacks in Georgia's Fifth Congressional District have less of an opportunity to participate and to elect representatives of their choice, but established that Act No. 5 has absolutely no adverse impact upon black voting strength.

Therefore, the District Court's ruling obviously contradicts this Court's opinion in *Beer* and presents a question of great magnitude, the resolution of which by this Court will affect all political subdivisions covered by Section 5 of the Voting Rights Act.

B. THE DISTRICT COURT'S HOLDING—THAT A REAPPORTIONMENT PLAN THAT DOES NOT HAVE THE PURPOSE OF DIMINISHING THE EXISTING LEVEL OF BLACK VOTING STRENGTH CAN, NEVERTHELESS, HAVE THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT—IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS COURT'S DECISION IN *CITY OF RICHMOND V. UNITED STATES*, 422 U.S. 358 (1975).

The District Court has misconstrued *City of Richmond* v. *United States*, 422 U.S. 358 (1975), to invalidate the reapportionment of Georgia's Fourth and Fifth Congressional Districts. In *City of Richmond*, a three-judge District Court held that the city's annexation of approximately 23 miles of adjacent county land had the purpose and the effect of diluting the black vote, in violation of Section 5 of the Voting Rights Act. The pre-annexation population of the City was 52% black; the post-annexation population was 42% black. The record in the case

contained numerous statements by public officials that the predominant motive of the 1969 annexation was to acquire 44,000 additional white citizens for the City in order to avert a transfer of political control to what was fast becoming a black population majority. 422 U.S. at 382.

On appeal, this Court reversed. With respect to the issue of effect, this Court held that "an annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential." 422 U.S. at 378. This Court held that the post-annexation single-member district ward plan did so recognize the minority's political potential, satisfying the effect test of Section 5, even though the annexation did reduce the political strength enjoyed by blacks prior to the annexation, and even though the City had rejected another ward plan presented by intervenors that would have given blacks more political strength. "To hold otherwise," this Court stated, "would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area." 422 U.S. at 371.

With respect to the issue of discriminatory purpose, this Court in *City of Richmond* held that the case should be remanded to afford the City an opportunity to show "whether there are now objectively verifiable, legitimate reasons for the annexation," *i.e.*, reasons other than reducing the pre-annexation black majority population to

the post-annexation black minority population. 422 U.S. at 375. Because the annexation, by itself, was retrogressive, it could only be justified under the annexation exception if the purpose of the annexation was to satisfy legitimate municipal objectives, rather than to diminish black voting strength. If the purpose was to " 'despoil colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights*', *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)," the annexation would fail the purpose test of Section 5. 422 U.S. at 378 [emphasis added].

The *City of Richmond* case is inapplicable to the case at bar, not only because it is an annexation, rather than a reapportionment, case, but also because it predates *Beer*, wherein it was distinguished as follows:

> "The *City of Richmond* case thus decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5. *The present case, by contrast, involves a change with no such adverse impact upon the former voting power of Negroes.*"

Beer v. United States, 425 U.S. at 139, n. 11 [emphasis added].

Act No. 5 does not reduce the political strength of black voters in the proposed Fifth District relative to their political strength in the old Fifth District; moreover, the voting change does not have the purpose of "despoiling" blacks "of their theretofore enjoyed voting rights." *City of Richmond v. United States*, 422 U.S. at 378. Under this Court's standards in *Beer*, the only way that an ameliorative, nonretrogressive voting plan, such as the one enacted by the State of Georgia, can be declared void is if "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer v. United States*, 425 U.S. at 141.

To prove that the apportionment effected by Act No. 5 continues to so discriminate on the basis of race or color as to violate the Constitution, evidence must be produced to support findings that the processes leading to the nomination and election in the Fifth Congressional District are "not equally open to participation [by blacks—that blacks have] less opportunity than do other residents [in the Fifth District] to participate in the political process and to elect [a Congressman] of their choice." [8] *White v. Register*, 412 U.S. 755, 766 (1973). *See also City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Whitcomb v. Chavis*, 403 U.S. 124, 149-150 (1971).

Here, as in *City of Richmond*, 422 U.S. at 377, there is "no indication" that the District Court gave "any attention to the . . . evidence in the record" (some of which was provided by the trial testimony of Appellee-Intervenors' own expert, Dr. Alex Willingham) that, since the legislative repeal of the poll tax on February 5, 1945 and the judicial repeal of the white primary on April 1, 1946, there have been no official barriers to black registration and voting in Fulton County, the City of Atlanta, and the Fifth Congressional District. In particular, no literacy tests were administered in the City of Atlanta, Fulton County, or the Fifth District to disenfranchise black voters in 1945-1965, the years preceding the passage of the Voting Rights Act of 1965.[9]

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[8] As in *Beer v. United States*, 425 U.S. at 142, n. 14, neither the United States nor the intervenors made an allegation that Act No. 5 was unconstitutional in the proceedings below.

[9] Notwithstanding the testimony of Dr. Willingham and Dr. Bob Holmes, an intervenor, on the lack of official barriers to black voting in the Atlanta area in the years immediately prior to the passage of the Voting Rights Act of 1965, and the absence of any evidence in the record to indicate otherwise, the District Court erroneously discredited the entire trial testimony of Representative Grace Hamil-

Furthermore, the District Court ignored the undisputed fact that blacks have long enjoyed effective access to the political process in the City of Atlanta and surrounding area. Of the population of the new Fifth District as redrawn by Act No. 5, 76.7% resides in the City of Atlanta. According to Appellants' evidence at trial, Atlanta has offered an atypical picture of the role of blacks in southern politics. *See, e.g.*, Walker, *Negro Voting in Atlanta: 1953-1961*, 24 Atlanta U. Rev. (Phylon) 379 (1963); Hornsby, *The Negro in Atlanta Politics, 1961-1973*, Atlanta Hist. Soc'y Bull. (Spring 1977); Bacote, *The Negro in Atlanta Politics*, 16 Atlanta U. Rev. (Phylon) 333 (1955). Indeed, as testified to by Political Science Professor Bob Holmes, an intervenor in the instant case, black voter participation in the City of Atlanta is and has been higher than in most of the northern cities such as Chicago, higher than in southern cities such as Birmingham and New Orleans, and higher than in Georgia cities such as Albany, Macon, and Valdosta.

Finally, the District Court totally ignored the undisputed trial testimony of Appellants' experts, Drs. Charles Bullock and Everett Lee, which conclusively established not only that black residents of Georgia's Fifth Congressional District have had great access and influence in the political process, including electing candidates of their choice prior to the latest reapportionment, but also that such black citizens will have an even greater ability to elect a Congressman under the 1981 apportionment.[10] In

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ton, a black legislator, because she stated that she "knew of no instances where black people had difficulty in registering or voting in the Atlanta area in the years just prior to" the passage of the Voting Rights Act. App., 8a, ¶18.

[10] Appellees failed to call their own expert, Dr. James Loewen, to rebut any of the election analysis and results given by Dr. Bullock at trial. Appellees' failure to call Dr. Loewen should have led the

fact, black citizens have been able to elect candidates of their choice in the Fifth Congressional District, as well as in Fulton County and the City of Atlanta (which make up the great majority of the Fifth District), over the past decade, even when the proportion of population of blacks in the area was much less than 50%. During 1972, 1974, and 1976, Andrew Young, a black candidate (and now Mayor of Atlanta), was elected Congressman from the Fifth District when the black percentage of population was below 50%, the black percentage of voting age population was well below 50%, and the black percentage of registered voters was below 40%. In 1977, 1978, and 1980, Wyche Fowler, a white, liberal Democratic candidate, was elected Congressman from the Fifth District with substantial black support. The extent of crossover voting in Atlanta area elections in 1970-1981 has shown great variation, negating any finding of racial bloc voting. The District Court's finding that racial "polarization" has increased since the time of Andrew Young's election to Congress in 1972, App., 5a, ¶10, is clearly erroneous. Mr. Young was reelected to that office in 1974 and 1976, receiving substantial white support. Moreover, white crossover voting for black candidates increased during the decade, as demonstrated by Dr. Bullock's ecological regression analysis.

Additionally, the undisputed testimony of Dr. Lee indicated that the black population of the Fifth District under Act No. 5 has already increased to nearly 60% of the total population, and will be well over that figure during the mid-1980's, accompanied by a substantial in-

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District Court to give the strongest weight to Dr. Bullock's testimony, which Dr. Loewen was in a position to contradict or explain. *See, e.g., Mammoth Oil Co. v. United States*, 275 U.S. 13, 51-53 (1927), *De Gaster v. Dillon*, 247 F.Supp. 511, 516 (D.D.C. 1963).

crease in the black voting age population in the area. *See Beer v. United States*, 425 U.S. at 142, n. 13; *Taylor v. McKeithen*, 499 F.2d 893, 896 (5th Cir. 1974). These data establish that black citizens of the Fifth Congressional District will have even greater access to the political process and will enhance their ability to select a Congressman of their choice. It is also clear from the record that the incumbent white Congressman, Wyche Fowler, is responsive to the needs of his black constituents, who have supported him in his last reelection efforts in 1978 and 1980.

Therefore, as in *Beer v. United States*, it "could [not] rationally" be contended that the reapportionment at issue "so discriminates on the basis of race as to violate the Constitution." 425 U.S. at 141. Nor, under *City of Richmond*, could it be contended that the voting change has an adverse impact on previous black voting power. *City of Richmond* does not condemn Act No. 5, because there is not even a suggestion in the record of this case that Act No. 5 had the purpose of reducing the present level of black voting strength. Absent a purpose to diminish the existing level of black voting strength or to despoil theretofore enjoyed voting rights, Act No. 5 cannot have a discriminatory purpose within the meaning of Section 5. The decision of the District Court not only misapplies this Court's decision in *City of Richmond v. United States*, but ignores this Court's later holding in *Beer v. United States*.

II. THE DISTRICT COURT'S FINDING OF DISCRIMINATORY PURPOSE SHOULD BE SET ASIDE BOTH BECAUSE IT IS BASED UPON AN ERRONEOUS VIEW OF THE CONTROLLING LEGAL PRINCIPLES AND ALSO BECAUSE IT IS BASED UPON UNDERLYING FACTUAL FINDINGS THAT ARE CLEARLY ERRONEOUS.

Appellants have briefly touched upon several erroneous findings (and the absence of other critical findings) which were instrumental in the District Court's decision. We will not burden this Court with a lengthy recitation of each finding which will be disputed by Appellants if this appeal is entertained, but merely point out that the District Court's findings may be set aside because of the lower court's misapplication of the legal standards in this case.

Of course, Rule 52 of the Federal Rules of Civil Procedure broadly requires that findings of fact should not be set aside unless "clearly erroneous." But, as this Court has recently observed, the above-stated rule does not apply when a District Court's decision is based upon an erroneous legal conclusion. "[I]f a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, ___ U.S. ___, 72 L.Ed.2d 66, 79 (1982).

This Court should, therefore, note probable jurisdiction to conduct a further review of the District Court's findings, given the lower court's misapplication of this Court's legal standards.

III. THE ISSUES PRESENTED ARE SUBSTANTIAL.

The District Court's legal theory that a State's reappor-

tionment plan which enhances minority voting strength, has no discriminatory effect, and does not deny minority voters access to the political process can, nevertheless, violate Section 5 of the Voting Rights Act of 1965, is not only at odds with this Court's previous decisions in Section 5 cases, but leaves other states enacting future reapportionments in a quandry. On the one hand, the District Court correctly indicates that, in order to pass the "effect" test of Section 5, an apportionment plan need not enhance or maximize black voting strength, as long as such plan does not diminish black voting strength. On the other hand, in order to pass the "purpose" test under the lower court's view, a legislature must not compromise by selecting a plan which does not sufficiently enhance black voting strength. To state that a legislature need not enhance minority voting strength under the effect analysis but cannot minimize such enhancement under the purpose analysis ignores logic, and introduces arbitrary, capricious, and unfathomable standards of conduct into the reapportionment process. Under the District Court's theory, the only legislative approach that could be taken so as to confidently avoid a court's disapproval of its reapportionment plan would be the adoption of a plan which maximizes black voting strength, even though such effect is not required by Section 5 or the Constitution. *See Beer v. United States*, 425 U.S. at 136-137, n. 8; *Whitcomb v. Chavis*, 403 U.S. at 149; *Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

In the instant case, both the history of successful black candidacies and the statistical analysis reveal that voting in the area encompassed by the Fifth District is not strictly along racial lines and that white crossover voting is often substantial. Moreover, elected representatives

are responsive to the needs of the black community, blacks are not hampered in obtaining access to the polls, and blacks are not denied effective participation in the political or economic life of the city. *Cf. Rogers v. Lodge*, ___ U.S. ___, 73 L.Ed.2d 1012 (1982).

The Georgia General Assembly enacted a Congressional reapportionment plan which increased the black percentage of population from 50.3% to 57.3% in a district in which a black had been elected three times with a majority white population. Moreover, the black percentage of voting age population was increased from 48% to 52%. That the Georgia legislature failed to provide for a district containing an even higher concentration of black voters should not invalidate the reapportionment scheme under the Voting Rights Act. Reapportionment brings into play a variety of competing considerations—ethnic, racial, political, economic, and otherwise. Compromise is the essence of the process. The District Court's decision stands for the proposition that a 57% black district is not sufficient where the legislature could have chosen, and rejected, a plan which would have created the maximum possible concentration of black electorate. The District Court found a discriminatory purpose from this "conscious minimizing of black voting strength." This Court has indicated that while redistricting bodies may properly take racial factors into account, *United Jewish Organizations v. Carey*, 430 U.S. 144, 165-168 (1977), they are not obliged to maximize the concentration of any racial group. *Beer v. United States*, 425 U.S. at 136-137, n. 8. If every such group were entitled to a majority district whenever one could theoretically be created, we would be well on the way to a theory of proportional representation which has been repeatedly rejected by this Court. *City of Mobile v. Bolden, supra.*

The impact of the District Court's decision is far-reaching. Anytime a State legislature enacts an ameliorative apportionment plan and, in doing so, fails to enact an alternative plan which would have further enhanced minority voting strength, that State will be hard-pressed to justify its "minimization" of the minority population percentage under the lower court's rationale. The Federal courts will, therefore, have to become "super-legislatures" by sorting through various alternative apportionment plans to ascertain whether the legislature knowingly rejected an option which would have created a greater minority district. State legislatures may well choose to "pack" minority residents into one district in order to create a maximum level of voter influence, which will necessarily lead to a dilution of minority strength in neighboring districts.[11] *See Mississippi v. United States*, 490 F.Supp. at 578. This will, in effect, lead to a decrease in the effective exercise of the election franchise by the particular minority group.

Thus, due to the irreconcilable conflict with decisions of this Court, the unfathomable legal standards set up for State legislatures to follow, and the erroneous factual findings made by the lower court, this Court should review the opinion and order of the three-judge District Court in the instant case.

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[11] Indeed, although the District Court wrote favorably about the Congressional plan passed by the Georgia Senate as it affected the Fifth District, that plan, in fact, substantially diluted minority voting strength in the neighboring Fourth District; whereas, under Act No. 5, blacks were assured of substantial influence in the political process in both districts. *See* pp. 6-7, *supra*.

CONCLUSION

For the reasons stated above, we respectfully submit that this Court should note probable jurisdiction to review the opinion and order of the three-judge District Court for the District of Columbia.

Respectfully submitted,

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PART I

DISTRICT COURT DECISION

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, et al.,
Plaintiffs

v.

WILLIAM FRENCH SMITH, et al.,
Defendants

WILLIAM C. (BILLY)
RANDALL, JR., et al.,
Intervenor-Defendants

CIVIL
ACTION
82-0665

BEFORE: Harry T. Edwards; Circuit Judge; Aubrey E. Robinson, Jr.; and June L. Green, District Judges

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This action was commenced by the State of Georgia pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The State seeks a declaratory judgment from this Court that Act No. 5 of the 1981 Extraordinary Session of the Georgia General Assembly, which is the plan for reapportionment of the State's congressional districts, "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c. Such a declaratory judgment is necessary for the State to implement its reapportionment plan, as the United States Attorney General refused preclearance of Act No. 5 upon his finding that the Fourth and Fifth Congressional districts created by the Georgia law violated the Voting Rights

Act of 1965. *See Id.*[1]

Trial was held before this three judge court from June 28 through July 1, 1982.

FINDINGS OF FACT

1. Application of 1980 Census figures to the 1972 Georgia congressional apportionment plan demonstrated that the districts delineated in the 1972 plan did not satisfy the one-person, one-vote standard of the Fourteenth Amendment to the United States Constitution. (Stipulation of Facts ¶ 3.) New districts had to be drawn to satisfy the constitutional requirement.

2. On August 13, 1981, the Governor of Georgia, George Busbee, called a special session of the Georgia General Assembly starting August 24, 1981 to consider, *inter alia*, reapportionment of Georgia's state legislative districts and congressional districts. (*Id.* ¶ 19.)

3. On September 17, 1981, the Georgia General Assembly adopted Act No. 5, Extraordinary Session 1981, providing for the reapportionment of Georgia's ten congressional districts. (*Id.* ¶ 47.) Governor Busbee approved Act No. 5 on September 22, 1981 and it became state law.

4. For each district created by Act No. 5, the total population, black population and deviation from the ideal population of 546,426 (for purposes of the one-person, one-vote requirement) are as follows:

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[1] On May 24, 1982, this Court enjoined the State of Georgia from implementing Act No. 5 in any fashion absent the requisite declaratory judgment sought in this case. The State had planned to begin implementation of its reapportionment law by opening the candidacy qualification period on May 26, 1982. Georgia unsuccessfully moved this Court, Chief Justice Warren Burger and Justice William Rehnquist for a stay of the injunction.

TABLE 1. Population of Districts Created by Act No. 5.

District	Total Population	Percent Deviation	Black Population	Percent Black
1	541,180	− .96	179,818	33.23
2	550,237	+ .69	200,646	36.47
3	540,865	−1.01	185,762	4.35
4	549,846	+ .62	116,530	21.19
5	542,592	− .70	310,822	57.28
6	548,891	+ .45	81,937	14.93
7	545,889	− .09	32,641	5.98
8	542,552	− .70	191,342	35.27
9	551,773	+ .97	28,608	5.18
10	550,440	+ .73	137,351	24.95

(Id. ¶ 45.)

5. The 1980 total population, black population and deviation from the ideal population of each district created by the 1972 appointment, which Act No. 5 replaced, are as follows:

TABLE 2. 1980 Population of 1972 Districts.

District	Total Population	Percent Deviation	Black Population	Percent Black
1	527,732	− 3.42	180,225	34.15
2	552,952	− 4.29	192,649	36.83
3	500,941	− 8.32	173,936	34.72
4	543,954	− .45	150,798	27.72
5	420,474	−23.05	211,634	50.33
6	626,354	+14.63	146,991	23.46
7	605,720	+10.85	40,086	6.06
8	508,028	− 7.03	156,721	30.84
9	660,892	+20.95	31,414	4.75
10	547,218	+ .14	181,003	33.07

6. Based on 1980 Census figures, in the Fifth Congressional district, 48% of the white population is of voting age and 52% of the black population is of voting age. However, 54% of the registered voters are white and 46% are black. (Stipulation of Facts, ¶ 50.)

7. Geographically, Act No. 5 splits Fulton County, Georgia into three congressional districts: the Fourth, the Fifth and the Sixth. DeKalb County is split between the Fourth and Fifth Districts. The cities of Atlanta, Roswell and Alpharetta are split on a north-south axis between the Fourth and Fifth Congressional districts. (Joint Ex. 23.)

8. Demographically, Act No. 5 splits into separate congressional districts cohesive neighborhoods and communities in that part of metropolitan Atlanta which lies in south Fulton and DeKalb Counties. The black population in Fulton and DeKalb Counties is concentrated in one contiguous area stretching from southwest Fulton County to south Central DeKalb County. During the past decade, the black population has increased dramatically in south Fulton and unincorporated south DeKalb Counties. Virtually all census tracts in this area displayed an increase in black population of 100 percent or more from 1970 to 1980. (Grier Trial Testimony, 532-537; Defendants' Exhibits EEE, FFF, GGG and FFFF.) The black population has not increased similarly in north Fulton and DeKalb Counties. A racial boundary line, which tracks the Southern Railroad Line and North Avenue in Fulton County and the Georgia Railroad Line in DeKalb County, separates the races in both counties on an east-west axis. (Grier Trial Testimony, 535.)

9. The racial boundary line formed by the Southern and Georgia Railroads and North Avenue, separates, in general, persons residing in rental dwellings from those in owner-occupied houses, persons who are apartment dwellers from home owners, and persons having larger families from those with smaller families. (Defendants' Exhibits AAAA, BBBB, CCCC, and DDDD; Grier Trial Testimony, 540-547.) Most of the citizens in southern Fulton and DeKalb counties share common political and

social concerns on account of their race, income, educational level, housing and household size. (*Id.*; Bond Trial Testimony, 561.)

10. Furthering the cohesion of black neighborhoods is the incidence of racially polarized voting which prevails in this area. (Young Deposition, 9, 31; Bullock Trial Testimony 255, 260, 263; Fulton [sic] Deposition, 43, 200-203, 228-228 [sic]; Lowe Deposition, 83-84, 226, 228-229; Holmes Deposition 79-88; Sells Deposition, 8-14, 17; Plaintiffs' Exhibit 25.) Although Andrew Young won a seat as a United States Congressman in the Fifth District in 1972 when the black population was a lower percentage than under the State's proposed congressional plan, the evidence indicates that racial polarization has increased since that time. (*Id.*)

11. Although Act No. 5 split a cohesive black community in Districts 4 and 5, it placed cohesive white communities throughout the state of Georgia into single Congressional districts. For example, the so-called "mountain counties" of North Georgia, which were described as having peculiarly unified interests and concerns, were placed together in the Ninth District. (Miller Trial Testimony, 169A.)

12. The demographics of south Fulton and DeKalb Counties were well known to members of the Georgia General Assembly in 1981. They were aware that black citizens of the same socio-economic background lived in this area. (*See* Finding ¶ 43, *infra.*) The testimony of Dr. George Grier and the exhibits prepared by him, though relying on census information not available in 1981, confirmed that which was readily apparent to the Georgia legislators at the time of the reapportionment at issue.

13. Historically, discriminatory tactics were commonly

utilized by whites against blacks in the south Fulton and DeKalb area. For example, literacy tests, the poll tax, the white primary and the county unit system were employed to destroy black voting strength. (Willingham Trial Testimony, 661-663.) *See, e.g., Gray v. Sanders*, 372 U.S. 368 (1963) (Georgia's county unit system found unconstitutional). In the 1970 reapportionment of the Atlanta area, the boundary line separating Districts Five and Six was drawn to fragment the concentration of black persons residing in the area. (Hamilton Trial Testimony, 133.) The line separating Districts Five and Six also was drawn to exclude from the Fifth District the residences of black persons who were clearly recognized as potential candidates for election in the Fifth District, and to include in the Fifth District the residences of white persons who were recognizable potential candidates. The residences of Andrew Young and Maynard Jackson (black persons recognized as potential candidates) were located approximately one block from the boundary of the proposed Fifth District. (Young Deposition, 28-31; Defendants' Exhibit N(a).) The reapportionment plan was submitted to the United States Attorney General for review pursuant to Section 5 of the Voting Rights Act and on February 11, 1972, the Attorney General interposed a Section 5 objection to the plan. The objection was interposed because the Attorney General was unable to conclude "that these new boundaries will not have a discriminatory racial effect on voting by minimizing or diluting black voting strength in the Atlanta area." (Defendants' Exhibit N(a).) The congressional reapportionment plan was subsequently revised by the Georgia General Assembly in 1972, and the Attorney General granted the necessary Section 5 preclearance to the revised plan. (Defendants' Exhibit N(b).) The 1972 plan

is the plan currently in effect. The aforementioned historical discriminatory practices were abandoned only when made illegal by civil rights legislation, objected to by the Department of Justice or enjoined by the Courts.

14. The reapportionment process which resulted in the enactment of Act No. 5 began with the appointment of legislature members to the House and Senate Reapportionment Committees.

15. The Chairman of those Committees had a significant impact on the plans that were considered by the reapportionment committees, the process by which they were considered and the plans ultimately adopted.

16. Speaker of the Georgia House, Thomas Murphy, who served as floor leader for former Governor Lester Maddox, appointed Representative Joe Mack Wilson Chairman of the House Permanent Standing Committee on Legislative and Congressional Reapportionment.

17. Representative Joe Mack Wilson is a racist. Wilson uses the term "nigger" to refer to black persons. (Wall Deposition, Vol. II, 57.) He stated to one Republican member of the Reapportionment Committee that "there are some things worse than niggers and that's Republicans." (Wilson Trial Testimony, 436.) Wilson opposes legislation of benefit to blacks, which he refers to as "nigger legislation." (Wall Deposition, Vol. II, 59; Coverdell Trial Testimony, 598; Wall Deposition, Vol. I, 30; Randall Deposition, 65-66; Wilson Deposition, 122, 148; Phillips Deposition, 36; Holmes Deposition, 52-55.) His views on blacks are well known to members of the General Assembly. From the House reapportionment committee to the Conference committee, Wilson played the instumental role in 1981 Congressional reapportionment and he was guided by the same racial attitudes

throughout the reapportionment process that guided his other legislative work.

18. Representative Grace Hamilton is a black who was appointed Vice-Chairman of the House Reapportionment Committee. She was one of two blacks appointed to the nineteen member committee. (Stipulation of Facts, ¶ 9.) She was unwaivering in her support of the leadership on the powerful House Policy Committee, which is the Speaker's vehicle for obtaining the necessary votes to either pass or defeat legislation. (Elliott Deposition, 11-12, 17-18; Randall Deposition, 19.) Illustrative of her perspective, Mrs. Hamilton testified that she knew of no instances where black people had difficulty in registering or voting in the Atlanta area in the years just prior to the passage of the Voting Rights Act of 1965. (Hamilton Trial Testimony, 155.) During the 1981 Congressional reapportionment process, Mrs. Hamilton served as a pawn for the House leadership. She has been characterized as an "Aunt Jane," the female analogue to "Uncle Tom." (Holmes Deposition, 58-58a.) (*See also* Randall Deposition, 121-124.)

19. With only one other black member of the House Reapportionment Committee, black citizens did not have effective representation on the Committee.

20. The Senate reapportionment Committee was an *ad hoc* committee established just prior to the 1981 legislative session. It was chaired by State Senator Perry Hudson, who was selected by Lt. Governor Zell Miller.

21. State Senator Julian Bond, a black, was also on the six member Senate Reapportionment Committee. He was the only black member.

22. One of the first official acts of both Committees was

a meeting with officials of the Voting Section in the Civil Rights Division of the United States Department of Justice, which, on behalf of the Attorney General, ultimately denied Section 5 preclearance of the Georgia reapportionment plan. (Stipulation of Facts, ¶ 10.)

23. At that meeting, the Georgia officials were informed that to comply with the Voting Rights Act, a reapportionment plan could have neither the purpose nor the effect of discriminating on account of race. Specifically, the legislators were instructed that a plan could not cause retrogression (a reduction in the percentage of black voters in a particular district) and that the legislators should not split concentration of black population. The legislators were further informed that because a larger percentage of whites vote than do blacks, for blacks to cast a majority of votes in a given election, at least 65% of the population in a district would have to be black. (Defendants' Exhibit CC, 2.)

24. Chairman of the House Reapportionment Committee Wilson denied that the Justice Department warned against splitting concentrations of blacks. (Wilson Trial Testimony, 446-47). Senator Hudson, testifying otherwise, acknowledged that the Justice Department had warned against splitting concentrations of blacks. (Hudson Trial Testimony, 358).

25. Approximately one week after the legislators' meeting with the Justice Department officials, Chairman Wilson stated at that time that he didn't know "what's going to be the outcome of this [reapportionment] because the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts." (Hudgins Deposition, 7-8.)

26. The shared reapportionment goals of the House and Senate committees, as articulated by their respective chairmen in documents distributed to Committee members, were:

(a) all plans were to comply with the Voting Rights Act of 1965 in that they were not to be developed with the purpose or have the effect of diluting minority voting strength;

(b) all plans were to comply with the one person, one vote requirement of the Fourteenth Amendment;

(c) county units were to be maintained in constructing districts;

(d) if county lines were not maintained, district lines should follow county precinct lines to the extent possible.

(Stipulation of Facts, ¶¶ 16-17; Joint Exhibits 8, 10.)

27. The Committees held joint public hearings throughout the State of Georgia at which citizens proffered their goals for reapportionment. The minutes of the public hearings revealed that while residents of some districts indicated a desire to retain existing districts, no participant in the Atlanta public hearing asked that the Fifth Congressional district be maintained in its existing configuration. (Joint Exhibit 5-Tab 9.)

28. Dr. Clinton Warren, representative from the Atlanta NAACP, stated at the Atlanta public hearing that, in adding population to the Fifth District, the reappointment committees should remember that south Fulton County has an increasing minority population and that these persons share economic and cultural ties with the City of Atlanta. (Joint Exhibit 5, May 21, 1981, Atlanta Public Hearing, Tab 9, at 3.) Dr. Warren implied that the black communities should be included entirely within the new Fifth District. Chairman Wilson testified

that the House Reapportionment Committee ignored Dr. Warren's recommendation; the Fifth District under the House passed plan split this very concentration of black population among three congressional districts. (Wilson Trial Testimony, 453-54.)

29. House Committee Chairman Wilson's stated goal, beyond the goals enumerated in the memorandum to committee members, was to keep Congressional districts in their "historical configuration", (Wilson Trial Testimony, 409); he admitted that the "historical" configurations were, in some cases, those which resulted after the 1970 apportionment. (*Id.*, 423.)

30. Representative Hamilton's chief objective was to keep the City of Atlanta intact and exclusively within the Fifth District. (Hamilton Trial Testimony, 135.) Nevertheless, she endorsed the House alternative to the Senate plan, discussed *infra*, which divided the City of Atlanta into two districts.

31. Lt. Governor Miller asserted that keeping the cohesive mountain counties together was crucial. (Miller Trial Testimony, 171.) He felt that uniting that area—where there are few blacks—was more important than keeping the cohesive black community in south Fulton and DeKalb counties together. (*Id.*, 201.)

32. Senator Hudson's goal was to maintain existing districts to the extent possible. (Hudson Trial Testimony, 334.)

33. Most of the factors which the legislative leadership identified as important were disregarded in the final apportionment plan. For example, Act No. 5 splits Gwinnett County between the Ninth and Tenth Congressional Districts and also splits the Gwinnett County municipali-

ties of Snellville and Loganville in the same manner. The Tenth District, which complied with the one-person, one-vote standard in its pre-existing configuration, now stretches from central Georgia to the Atlantic Ocean, and bears no resemblence to the pre-existing district. (Citizens at the Tenth Congressional District Public Hearing were overwhelmingly in favor of keeping their district "as it is." *See* Joint Exhibit 5, Tab 12, at 7, 9, 10.) Moreover, the reapportionment of the Tenth District did not protect Congressman Doug Bernard, as "he [lost] a great many of the counties around his home area," (Murphy Trial Testimony, 30; *see* also Murphy Deposition, 60), and a portion of predominantly Republican Gwinnett County was added to the Tenth District. Finally, DeKalb County is split between the Fourth and Fifth Districts. (Joint Exhibit 23; Defendants' Exhibit NNN.) Where compromise was necessary, the goals were ignored. (Elliott Deposition, 30-31; Felton Deposition, 38-39; Lowe Deposition, 47-48.)

34. However, in drawing the Fifth District, those goals which were realized were characterized by the leadership as inviolable, with the result that the "historial" line dividing the black community in metropolitan Atlanta was preserved. (*See, e.g.*, Wilson Trial Testimony, 450.) The committee process, floor consideration and conference committee work demonstrate that the purported inviolability of those goals was a pretext for splitting the cohesive black community in the greater Atlanta area of south Fulton and DeKalb counties.

35. The House Reapportionment Committee was divided into two subcommittees, one to consider state legislative reapportionment and the other to consider Congressional reapportionment.

36. Chairman Wilson maintained, incredibly, that he exercised absolutely no control over the proposals considered by the subcommittees or committee as a whole. (*See, e.g., id.*, 411-414.)

37. In fact, Rep. Wilson utilized the full power of his position and personality to insure passage of his desired Congressional plan.

38. At the outset of and throughout the process, Wilson threatened and cajoled legislators that if they did not support him on Congressional redistricting, the members' legislative districts might be in jeopardy. Wilson maintained at trial that since legislative redistricting was completed before Congressional reapportionment, such threats were unenforceable. Wilson overlooked that aspect of the legislative process known as "logrolling," where a legislator agrees to a future vote on behalf of another legislator who has power over a present legislative proposal. Some legislators were willing to trade their vote on Congressional redistricting to insure the configuration of their own legislative districts.

39. The Senate and House reapportionment committees agreed to complete the legislative reapportionment plans for their own bodies prior to focusing on congressional reapportionment. (Stipulation of Facts, ¶ 20.) Reapportionment of House districts proceeded on a delegation-by-delegation basis until completion of the plan. This procedure permitted Chairman Wilson to "lock-in" support for his positions for the duration of the congressional, as well as the House, reapportionment processes. (Scott Trial Testimony, 626.) Accordingly to Representative Scott:

> Whenever a delegation or a member of that [reapportionment] committee was allowed to have a signifi-

> cant amount of input in drawing his own district, . . . he was really committed to the chairman for the duration of the reapportionment process to support the chairman's views on reapportionment positions.

(Scott Trial Testimony, 625.) Chairman Wilson actually asked legislators appearing before the committee, "If I allow you to make some changes in your district, are you going to be with me?" (*Id.*) The commitments Chairman Wilson obtained during the reapportionment of the House, in fact, translated into votes for his position on congressional reapportionment.

40. Representative Auten noted that some legislators had voted for or against reapportionment plans because "the leadership of the House or the leadership of the Senate told them to . . . Fear of losing your district line has been an agenda of the day. I'm afraid I'm going to get hurt if I don't vote for it you tell me." (Joint Exhibit 16 at 194.) In light of this public testimony from the well of the House, Chairman Wilson's trial testimony that threats were not used to secure votes for the conference committee plans is incredulous. (Wilson Trial Testimony, 434-35.)

41. The General Assembly received technical assistance in developing congressional and legislative reapportionment plans from the Reapportionment Services Unit. The Reapportionment Unit is a separate unit of the Institute of Government at the University of Georgia, and operates under a contract with the General Assembly. (Meggers Deposition, 67-79.)

42. The Director of the Reapportionment Unit is Linda Meggers. During the reapportionment process, she worked under the direction of the Chairman of the House and Senate Reapportionment Committees, and also re-

ported to the Director of the Institute of Government. (Meggers Deposition, 67, 72-73.)

43. The staff of the Reapportionment Services Unit drew plans and provided census data to the legislators. (Meggers Deposition, 78-79.) The staff also prepared color-coded maps, including one of the Atlanta metropolitan area, showing the location of significant concentrations of black population. These maps were displayed on the walls of the reapportionment staff office and most legislators who came to the Reapportionment Unit for discussions with staff members passed through that office. (Bunting Deposition, 45-48; Nally Deposition, 24-27; Vey Deposition, 10.) With respect to the location of black population concentrations in the Atlanta metropolitan area, it was common knowledge amongst legislators and staff members that the black population had spread from Atlanta into south DeKalb County. (Nally Deposition, 27; Vey Deposition, 30-31; Allgood Deposition, 16-18; Bond Trial Testimony, 561; Elliott Deposition, 45-47.) The Atlanta press, immediately prior to reapportionment, reported about the shift of black population to the southern suburbs of Fulton and DeKalb counties. (Defendants' Exhibit BBB, Atlanta Constitution, April 26, 1981.)

44. The reapportionment staff was given specific instructions by Linda Meggers regarding the manner in which districts should be drawn which contain black population concentrations. The staff was instructed by Meggers that they should try to avoid dilution or a reduction in black voting strength and that they were to inform legislators when reapportionment plans drawn at the legislators' request resulted in vote dilution. (Bunting Deposition, 22-23; Nally Deposition, 12-14; *see also* Vey Deposition, 17.) Furthermore, Meggers instructed the

staff that a "safe black district" is a district that contains a 65 percent black population, and legislators understood that the 65 percent figure was the goal the staff was seeking to achieve. (Bunting Deposition, 18-21; Nally Deposition, 10, 14; Vey Deposition, 15, 50-51, 68-69; Lowe Deposition, 22-23, 160.) It was the understanding of the staff that a district must be 65 percent black in order for it to be considered "safe" because blacks have a lower voting age population and a lower registration rate than the white population. (Bunting Deposition, 18-21.) Finally, the staff was instructed that, in drawing district lines, they should try to avoid splitting black population concentrations and that they were to inform legislators when plans requested by the legislators resulted in the division of black populations. (Bunting Deposition, 14-17; Nally Deposition, 15-18.) Staff members also were provided with a copy of the memorandum prepared by the Office of Legislative Counsel which discussed how the Voting Rights Act applied to Georgia's reapportionment process. (Vey Deposition, 7-8.)

45. The Chairman of the House Reapportionment Committee, the Senate Reapportionment Committee, as well as the Speaker of the House, relied on the reapportionment staff to inform them when plans impaired minority voting strength and violated the Voting Rights Act. (Murphy Trial Testimony, 59-60; Wilson Deposition, 216-217; Starr Deposition, 16-18.)

46. Other guidelines followed by the reapportionment staff in drawing plans were that they were to follow the one-person one-vote standard, district lines were to follow natural boundaries, county lines were not to be split if possible, and incumbents were to be kept in separate districts. There were no set instructions regarding the

maintenance of existing district lines. (Bunting Deposition, 26-28; Nally Deposition, 9-11; Vey Deposition, 8-9.)

47. During the summer of 1981, prior to the General Assembly's Special Session on reapportionment, the reapportionment staff, at the direction and under the supervision of Linda Meggers, drew 16 alternative congressional reapportionment plans. These plans were designed to show the many different ways in which the existing congressional districts could be altered within the context of the one-person, one-vote standard. (Meggers Deposition, 494-496; 543-610; Defendants' Exhibit EE.) For example, Alternative 3 was developed with the "idea of creating a horseshoe suburban district around the top of Fulton County and a strictly mountain district across the top of Georgia." (Meggers Deposition, 551-552.) Alternative 4 was developed as an attempt to draw congressional districts that maintained proposed House and Senate districts within a single congressional district. (Meggers Deposition, 561-562.) With reference to the so-called "mountain district," some alternative plans drew such a district (*e.g.*, Alternatives 3 and 6; *see* Defendants' Exhibit EE) while others did not (*e.g.*, Alternatives 1, 2, 4, and 5; *see* Defendants' Exhibit EE.)

48. Though Meggers described the alternate plans as "practice exercises" for the reapportionment staff, the plans were presented to both the House and the Senate Reapportionment Committees and were sent to Georgia's Congressmen. (Meggers Deposition 495-496.) Moreover, Alternate 7 Revised was adopted by the House Reapportionment Committee on August 12, 1981 (the Committee later adopted a different plan), and the Senate Reapportionment Committee, on August 18, 1981, adopted Alternate 11 Revised as amended by Senator

Bond. (Bond Trial Testimony, 565-566; Joint Exhibits 12 and 13.)

49. The only district of the ten congressional districts in Georgia that basically remained the same in all the alternate plans was the Fifth Congressional District. In almost all the plans, the configuration of the Fifth District followed the pre-existing district line; it stretched from north to south Fulton County, with part of east Fulton County lying in the Fourth Congressional District and part of south Fulton County lying in the Sixth Congressional District. In three alternate plans (Alternates 4, 5 and 7 Revised), Fulton was divided between two congressional districts, districts Five and Six. (Defendants' Exhibit EE.) The black population percentage in the Fifth District in all the alternate plans remained between 51 and 52 percent. (Meggers Deposition, 509, 511, 660-662; Joint Exhibit 7, Transcript of Senate Reapportionment Committee Meeting of August 5, 1981, at 9.)

50. Though the alternate plans all contained basically the same configuration for the Fifth District, Linda Meggers had developed, in May, 1981, a potential Fifth District configuration known as "Fifth District Maximizing" which had a black population percentage of approximately 74 percent. The district lay on an east-west axis stretching across south Fulton and south DeKalb counties. This district could have been included in the alternate plans, but was not. (Defendants' Exhibit DD; Meggers Deposition, 380-382, 654-656.) Ms. Meggers testified, however, that had she not been bound by the pre-existing configuration of the Fifth District and had started from scratch, she would have drawn a district that went east to west to encompass the black concentration. (Meggers Deposition, 737-740.) "I would have drawn a black

district. I would not have gone another direction that did not create a black district." (*Id.*, at 739.)

51. The Congressional reapportionment subcommittee adopted the plan submitted by Representative Benson Ham, which permitted the Fifth District a black population of 51.73%.

52. Representative Albert Scott, one of the two black members of the Reapportionment Committee, attempted to have plans for the Fifth District introduced in subcommittee. Scott's plans placed the Fifth District on an east-west axis, encompassing the black community of Metropolitan Atlanta. (Defendant's Exhibits TTT-VVV.)

53. Chairman Wilson persuaded Scott not to present his plans to the subcommittee and asked him to make his presentation to the full committee as an alternative to the subcommittee recommendation. (Scott Trial Testimony, 631.) According to Representative Scott, not one of his three options was acceptable to the full Committee. Chairman Wilson informed Representative Scott that "we might get to one of your options during the conference committee." (Scott Trial Testimony, 631-632.)

54. On August 12, 1981, the full House Reapportionment Committee adopted the plan presented by Representative Ham.

55. The Senate Reapportionment Committee was not divided into subcommittees.

56. The full committee narrowed its choice of congressional plans to two proposals which would have created a Fifth District in which the black population was 51.73% of the total population. (Defendants' Exhibits FF and GG; joint Exhibit 7.)

57. On August 17, 1981, committee member Senator Julian Bond introduced a plan for the Fifth District which provided for a 73.38% black population.

58. Senator Bond's proposal encompassed the black communities of Fulton and DeKalb counties, abandoning the pre-existing north-south boundaries of the Fifth District. Senator Bond's rationale for drawing his plan, which he explained to the Senate Committee, was:

> to put together a large, harmonious, homogeneous black community living in southern Fulton and DeKalb counties who share a common income level generally. The value of their housing stock is generally the same. Their education level is generally the same. And most important, their race is almost absolutely the same.

(Bond Trial Testimony, 561.)

59. The Bond plan did not affect districts other than the Fourth and Fifth. It was introduced relatively late in the committee process to insure that disputes on other districts had been resolved and that this proposal would have no effect on the drawing of the other districts. (Bond Trial Testimony, 564.)

60. The Bond plan was immediately critized [sic] by Committee Chairman Hudson. The Chairman adjourned the meeting at which the Bond plan was introduced without holding a vote on the plan, commenting, "We've been informed and shocked, so we will look at that overnight." (Joint Exhibit 7, 30.)

61. The next day, the reapportionment committee adopted a plan which included the Bond proposal. Chairman Hudson cast the lone vote in opposition, in violation of Georgia Senate rules, which permit the Chairman to vote only in the event of a tie. (Joint Exhibits 4, 7.) That

action was the first of several that Hudson would take to avoid a reapportionment plan which would allow blacks in the metropolitan Atlanta area a unified district.

62. When the Bond Amendment was brought to a vote, Senator Terrell Starr "took a walk," rather than vote on the Amendment. (Bond Trial Testimony, 565.) Senator Starr admitted that he opposed the Bond Amendment as proposed in Committee. (Starr Deposition, 65-68.) The record, as a whole, clearly demonstrates that Senator Starr and Senator Hudson were opposed to the Bond plan because the proposed Fifth District might allow the black community an opportunity to elect a candidate of its choice to the United States Congress. All other members of the Senate Reapportionment Committee supported the Bond plan.

63. The special session of the Georgia General Assembly convened on August 24, 1981. (Stipulation of Facts, ¶ 19.)

64. On August 25, 1981, Senator Hudson, as Chairman of the Senate Reapportionment Committee, introduced in the Senate the proposed congressional redistricting plan that had been adopted by the Senate Committee on August 18, 1981. The plan was introduced as Senate Bill 2 EX., which was read for the first time and in accordance with Senate procedures, transmitted back to the Senate Reapportionment Committee. In committee, the plan embodied in Senate Bill 2 EX. was substituted by the "Reynolds Revised plan with the Bond Amendment." (Defendants' Exhibit GG.) The Senate Committee recommended to the full senate that the Reynolds Revised Plan, as amended, be adopted. (Joint Exhibit 13.) This plan, like the earlier plan which had originally passed out of the Senate Committee, created a Fifth Congressional

District with a 73.38% black population. (Bond Trial Testimony, 566.)

65. On the floor of the Senate, Chairman Hudson, along with Senator Starr—at the urging of Lt. Gov. Miller—introduced an amendment to the plan recommended by the Committee. (Hudson Deposition, 181-184; Starr Deposition, 27; Miller Deposition, 67-68.) The amendment did two things: it dealt with controversial Gwinnett County by splitting that county between two districts so that Gwinnett County would not overshadow the mountain district in the Ninth District; as noted in Finding ¶ 17, *supra*, the mountain district was the home of Lt. Gov. Miller and its electoral strength was of special concern to him. (Miller Trial Testimony, 169A; Finding ¶ 31, *supra*.) The amendment also drew a Fifth District with a 55.74% black population and placed the City of Atlanta in the Fifth District. Much of south Fulton County was placed in the Sixth District, with the exception of Senator Hudson's residence and senatorial district. (Defendants' Exhibit HH.)

66. Senator Bond moved to amend the Hudson-Starr plan to allow a Fifth District with a 69.01% black population; the Bond amendment was essentially the same as the plan adopted by the Senate Reapportionment Committee. (Defendants' Exhibit RRR.)

67. Senator Hudson went to the well of the Senate and spoke in opposition to the Bond amendment: "It brings out resegregation in a fine county like Fulton and resegregation in a fine city like Atlanta." (Defendants' Exhibit W.) He also argued that the Bond plan would disrupt the "harmonious working relationship between the races" in Atlanta and Fulton counties, (Bond Trial Testimony, 568; Allgood Deposition, 20-21) and would cause "white

flight" from the county. (Nalls Deposition, 153.) The thrust of Senator Hudson's argument, according to Senator Allgood, was that "you are dividing the Congressional Districts into black and white and they [the races] should be commingled. . . ." (Allgood Deposition, 20-21.) At trial, Senator Hudson admitted that his opposition to Senator Bond's plan was stated in racial terms. (Hudson Trial Testimony, 363.)

68. Two additional Senators went to the well to support the Bond amendment. Senator Tate, the only other black Senator in the General Assembly, responded to Senator Hudson's remarks. He noted that it was peculiar that people worried about the harmonious working relationships in the single district in which whites might constitute the minority of the population, but made no mention of working relationships in the other nine congressional districts in which whites constituted 65 percent or more of the population and blacks were in the minority. (Bond Trial Testimony, 568.) The second spokesperson, Senator Allgood, emphasized his support of the Bond plan and attempted to dispel the racist characterizations of the proposed Fifth District. He noted:

> If it is a ghetto, so be it. We did not create it. We merely recognize in this amendment what exists there, and we give those people an opportunity, a mere opportunity. If they want to elect [a] black, let it be.

(Defendants' Exhibit W, Video Transcript at 3.)

69. Both Senators Hudson and Starr voted against the Bond amendment, which the Senate adopted. (Joint Exhibit 13, at 139.)

70. The final plan passed by the Senate contained the Bond amendment. It was transmitted to the House for

consideration.

71. The House referred the Senate plan to the reapportionment committee, which rejected it. (Joint Exhibit 6.) It chose instead a plan designed by Representative Williams and Chairman Wilson (who at trial disavowed any part in its formulation). (Wilson Trial Testimony, 414.) That plan returned to the pre-existing Fifth District configuration, which split Fulton County, and the black population, into three congressional districts. The total black population in this Fifth District proposal was 51.74%. (Defendants' Exhibit MM.)

72. Joe Mack Wilson opposed the Bond plan. Representative Wilson testified at trial that his objection to the Bond plan was that it packed or herded "all the black people in one district, and created a lily white district on the opposite side in the Fourth District." (Wilson Trial Testimony, 417, 457-458.) He admitted, however, that he does not consider the creation of a congressional district with a 70 percent white population to be herding whites as "they were already there." (*Id.*, 460-461.) The inconsistency of Chairman Wilson's standards is based solely on race.

73. At trial, Chairman Wilson and Speaker Murphy also raised the spectre that a Republican would be elected from the Fourth District under the Senate plan. (Wilson Trial Testimony, 489; Murphy Trial Testimony, 67-68.) This testimony, however, is entirely inconsistent with their previous testimony on the subject. Chairman Wilson testified in deposition that the possible creation of a Republican district played no role in his opposition to the Senate plan. (Wilson Deposition, 677.) He also observed that throughout the House, there "ain't no fear of Republicans," and cited the fair reapportionment of Republican

Newt Gingrich's Sixth District as evidence. (*Id.*, 678.) Similarly, Speaker Murphy denied opposition to Republican districts. He testified that "we made no efforts . . . to try to get it to where a Republican who is now serving couldn't be re-elected." (Murphy Deposition, 131.)

74. On the House floor, there were three attempts to amend the Williams-Wilson plan with respect to the Fifth District and one attempt to substitute it. Rep. William McKinney, a black representative, proposed a Fifth District with a 60.87% black population. This plan was identical to that proposed by Rep. Scott during the presession committee process. The second amendment, introduced by Reps. Bolster and Fuller, was similar to the McKinney proposal. The final proposed amendment was offered by Rep. Lane. It removed approximately 2,900 "moderate, conservative folks" from the Fifth District and placed them in the Sixth District in order to "give [them] representation." (Joint Exhibit at 84.) Rep. Scott offered a substitute to the Williams-Wilson plan, which created a Fifth District with a 60.87% black population. Two primary spokesmen for the House leadership, Reps. Williams and Ham, voiced strenuous opposition to the three amendments and Scott Subtitute [sic] 13A. Representative Williams stated from the well of the House that he "[did not] see that we need to unnecessarily create a minority district in Fulton and Dekalb." (Joint Exhibit 16, at 73.) Representative Ham criticized the Bolster-Fuller Amendment and Scott's Substitute 13A because they created "a primarily white district in northeastern Fulton County and DeKalb County and Rockdale County and a primarily black district in the Fifth District in Fulton County." (Joint Exhibit 16, at 74.) According to Representative Ham, the two incumbent Congressmen from the Fourth and Fifth Districts would lose their seats

as a result of such a reapportionment. (Id.) Moreover, Representative Ham considered the creation of 60.87 percent black district in Fulton and DeKalb Counties to be the product of racial gerrymandering. (*Id.*, 17.) He was not able, however, to respond to challenges by members of the Legislative Black Caucus about the inequity of the Williams-Wilson plan which, first, created nine congressional districts having 60 percent or greater white population and, second, gerrymandered part of the black community in southeast Fulton County out of the Fifth District and placed it in the Fourth. (*Id.*, 16-17; *see* also Defendants' Exhibit SSS.)

75. All three amendments were defeated; the Scott substitute was never presented to the House for a vote. (Joint Exhibit 12.)

76. The Williams-Wilson substitute for the Senate Bill was passed. (*Id.*) Under the House plan, Fulton County and its black population were split into three congressional districts—the Fourth, the Fifth and the Sixth. (Defendants' Exhibit OOO.) The Fifth District had a black population of 51.74%.

77. Mr. Wilson has virtually admitted that his proposal for the Fifth Congressional District was motivated by a desire to minimize black voting strength. He testified at trial:

> [T]he Senate has passed one that is about [69] percent. So although I don't have any objections to the Scott Plan [with a 60.87 percent black Fifth District] as a personal thing, I don't want to start out at 60 percent to negotiate.

(Wilson Trial Testimony, 470.) Mr. Wilson was of the view that the Voting Rights Act would clearly not allow him to lower the black percentage of the Fifth District

below 50%, (Wilson Trial Testimony, 404) and, thus, in light of what the Senate had done, he determined that a 51 percent black district was "the place you start." (Wilson Trial Testimony, 461.) Although Mr. Wilson recognized that the foreseen conference procedure would require some movement from 51 percent, he clearly was determined to maintain black voting strength at the lowest possible level. This strategy was consistent with his opposition to drawing what he referred to as a "nigger district."

78. The Senate rejected the House substitute for the bill; the House reaffirmed its position. (Stipulation of Facts, ¶¶ 27, 29.) Thereupon, conference committees for the House and Senate were appointed.

79. The Conference Committee was principally responsible for the reapportionment of the Fourth and Fifth Districts which ultimately were included in Act No. 5.

80. The power of the conference committee cannot be underestimated. As Chairman Wilson explained to Representative Scott during the reapportionment committee process: "[t]he congressional reapportionment was not going to be decided at the committee level nor on the full floor of the House. It would be decided in conference committee." (Scott Trial Testimony, 612.)

81. The conference committee controls the final form of legislation (Elliott Deposition, 38-39.) A conference committee report cannot be amended on the floor of the House or the Senate, so the members must either accept or reject the report. Theoretically, a legislator may make a motion to instruct the conference committee to consider a different viewpoint, but such efforts would be futile if the leadership opposed the suggestion. Thus, there is no

legislative mechanism for presenting views which are contrary to the leadership's position before the General Assembly for a vote. (*Id.*)

82. The identity of the conferees makes a significant difference in the final legislation adopted.

83. The reapportionment conference committee was packed by the House and Senate leadership with individuals who overtly opposed any plan which would unite the black population in the metropolitan Atlanta area or increase the black population above a level that satisfied the "no retrogression" effect test of Section 5. The Conference Committee demonstrated best of all the discriminatory purpose of the Georgia legislature in adopting Act No. 5.

84. The only criterion for appointment to the Conference Committee from either the House or the Senate is that a legislator must have supported his chamber's proposal as a whole, even if he opposed certain aspects of the proposal. (Joint Exhibit 3.)

85. In the House, Speaker Murphy's asserted criteria for selecting the three House Conferees was that each section of the state (north, middle, south) be represented. (Murphy Trial Testimony, 32.)

86. No blacks were selected to serve on the conference committee although some satisfied the criteria for selection. Speaker Murphy claimed to have asked Representative Hamilton to serve on the committee; (Murphy Trial Testimony, 44); Rep. Hamilton denied ever being asked to serve. (Hamilton Trial Testimony, 141.)

87. Speaker Murphy refused to put Rep. Scott on the conference committee because, "I did not think that [the conferees] would ever reach a conclusion of a conference

committee report that the House would ever adopt." (Murphy Trial Testimony, 45.) Since the Senate plan had already been defeated in the House, nothing would be accomplished by placing "a Representative on there who would come back with that same plan." (*Id.*, 45-46.) Speaker Murphy was fully aware, however, that the Black Caucus also endorsed the Scott plan which provided for a much lower percentage of black population in the Fifth District than the Bond plan. (*Id.*, 47.) The 60.87 percent plan was also unacceptable to the Speaker because the House had previously voted on and defeated this plan in the form of the McKinney Amendment. (*Id.*, 49.) That single vote was sufficient to convince the Speaker that if he had put "Representative Scott on [the conference committee] it would [n]ever come back with a plan that the House would adopt." (*Id.*, 48.) The Speaker agreed, however, that Representative Scott could have signed a conference report with the three Senate conferees, and, thereby, passed out a conference report that would have given House members an opportunity to vote on the 60.87 percent plan. (*Id.*, 48.) Speaker Murphy consciously denied the House members the opportunity to vote on such a plan.

88. Speaker Murphy testified that he opposed the Bond Amendment because "I was concerned that . . . we were gerrymandering a district to create a black district where a black would certainly be elected. . . ." (Murphy Trial Testimony, 68.) Speaker Murphy's attitude about a majority black district is also reflected in a statement he previously made to several legislators. Speaker Murphy had delivered a speech to a Parents-Teachers Association meeting in DeKalb County. The audience had only two black individuals in attendance. After the speech, Speaker Murphy described the racial composition of the audience

to several legislators, and noted, "Wouldn't you love to have a district like that." (Elliott Deposition, 132-133.)

89. Speaker Murphy's racial attitudes are highly relevant to this case because he appointed the House conferees—the ultimate decision-makers in the congressional reapportionment process. The evidence demonstrates that Speaker Murphy purposefully discriminated on the basis of race in selecting House members to serve on the conference committee. He selected white persons whom he knew would adamantly oppose the creation of a congressional district in which black voters would be able to elect a candidate of their choice to the United States Congress; and he refused to appoint black persons to the conference committee solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice.

90. Speaker Murphy appointed Representative Ham, who authored the initial House proposal for the Fifth District containing a bare minimum black population to satisfy the "effect" element of Section 5. Speaker Murphy also appointed freshman legislator John Godbee, who was described as a pliable, inactive participant in the reapportionment process. (Elliott Deposition, 40-41.)

91. Speaker Murphy also appointed Rep. Joe Mack Wilson. Throughout the conference process, Wilson's asserted goal was "if that line [in the House plan] splits it [the black population], I was going to continue to hold that line" which formed the previous boundary for the Fifth District and which split the black population in greater Atlanta. Wilson said he opposed the Senate plan because it "packed all the black people in one district." (Wilson Trial Testimony, 417, 457-458.) Wilson had no objection to "packing" the white voters in the mountain

district into one congressional district. (*Id.*, 460-461.)

92. In the Senate, Lt. Gov. Miller's opposition to the Bond plan motivated his selection of the Conference Committee members. His proffered reason for opposing the Bond plan was that it split the mountain district and created a Republican Fourth District. The Bond plan had no effect on the mountain counites [sic]. (Joint Exhibit 13.) An examination of the Bond Amendment and S.B. 2 EX. proves that the Lieutenant Governor's opposition to the Bond Amendment could not be based on its impact on the mountain counties (Joint Exhibit 13, 137-138; Joint Exhibit 14); all ten mountain counties are included in the Ninth District and the Bond Amendment, by design, affected only the Fourth and Fifth Districts. (Miller Trial Testimony, 190-191; Bond Trial Testimony, 563-565, 566-567.)

93. The Lieutenant Governor's alleged reason for opposing the configuration of the Fourth District, *i.e.* it created a Republican district, is similarly suspect. According to Senator Bond, no Senator argued at the time of reapportionment that the Bond Amendment would result in the creation of a Republican congressional district. (Bond Trial Testimony, 568.) Senator Paul Coverdell, a Republican who is minority leader in the Senate, agreed that the issue of creating a Republican district was not raised in reference to the Bond Amendment during the entire process. He stated:

> This was not a Republican matter. The entire issue that was being debated was what the minority percentage would be in the Fifth District, pure and simple. There were many instances one might note that would indicate ample opportunity to indicate that this was a Republican-Democrat matter. In fact, this was not. The question was minority repre-

sentation in that district.

(Coverdell Trial Testimony, 599-600.) Moreover, it is significant that Lieutenant Governor Miller did not oppose the reapportionment of the Sixth Congressional District, which is represented by Republican Newt Gingrich. The Sixth District under both S.B. 2 EX. and Act No. 5 remained virtually the same as it had been under the 1972 reapportionment plan. (Plaintiffs' Exhibit 1.) Thus, the single incumbent Republican Congressman from Georgia was treated quite differently than one would expect if the fear of Republican representation were sincere. Furthermore, Lieutenant Governor Miller put his seal of approval on the plan drawn by Senator Hudson (the Hudson-Starr plan), which before it was amended by the Bond Amendment, put a portion of the predominantly Republican Gwinnett County (Wilson Trial Testimony, 418) in the Fourth Congressional District. (*See* Defendants' Exhibit HH.)

94. Beyond the technical requirement that a conferee must have voted in support of his chamber's proposal, it is expected that a conferee will urge adoption of a final bill which embodies as much of his chamber's proposal as possible. (Murphy Trial Testimony, 44; Miller Trial Testimony, 179.) Notwithstanding this custom and notwithstanding the fact that the Fifth District was a major conference issue, Lt. Gov. Miller appointed the two most outspoken opponents to the Bond amendment contained in the Senate bill: Senator Starr and Chairman Hudson. Mr. Miller purposefully discriminated on the basis of race in selecting Senate members to serve on the conference committee. He not only denied Senator Bond a position on the conference committee because of Senator Bond's race, but he also selected two members (out of three) who

were adamantly opposed to the Senate's position on the area of primary dispute.

95. Senator Bond was not appointed to the conference committee because, "it would offend the House." (Bond Trial Testimony, 571.)

96. There were only two major issues considered in conference: the division of Gwinnett County (whose population was not welcomed in the homogenous mountain district) and the racial composition of the Fifth District. (Hudson Trial Testimony, 367; Wilson Trial Testimony, 417-418.)

97. The Conference Committee produced six reports before the House and Senate finally agreed on a reapportionment plan. The initial six conferees were reappointed to each succeeding conference committee. (Stipulations of Fact, ¶¶ 30-47.)

98. Virtually no serious discussion of alternate plans occurred at the conference committee meetings. (Bond Trial Testimony, 573; Nalls Deposition, 162; Nally Deposition, 34-35.) The meetings seldom lasted more than two or three minutes, and the substance of the discussion was essentially "We've rejected that already;" "Go back and bring us something else;" or "We will take it back and study it or try it and see what our people say and bring it back later." (Bond Trial Testimony, 573.) One observer noted that as the meetings progressed, "you got the distinct impression that the decision was made before they walked in there." (Nalls Deposition, 162.) The Senate conferees participated equally in the meetings. As for the House conferees, "Representative Wilson . . . absolutely dominated the proceedings. Representatives Ham and Godbee seldom, if ever, speaking; then when they did, deferring to Representative Wilson." (Bond

Trial Testimony, 574; Kidd Deposition, 18.)

99. Reapportionment of the Fifth District dominated the conference committee's discussions from September 3 to September 10, 1981, at which time the First Conference Committee Report was passed out of Committee. (*See* Joint Exhibit 17.) The debate on the Fifth District focused solely on the percentage of black population to be included in the district. (Bond Trial Testimony, 579; Kidd Deposition, 19; Nalls Deposition, 162-166; Vey Disposition, 40-49; Allgood Deposition, 49.) There was no discussion pertaining to the creation of a new Republican district (Bond Trial Testimony, 574; Vey Deposition, 48-49), the desired placement of particular black neighborhoods of DeKalb County in the Fourth District (Bond Trial Testimony, 579), or the desired maintenance of the pre-existing configuration of the Fifth District. (Kidd Deposition, 40; Bond Trial Testimony, 574.)

100. The Senate conferees presented five or six proposals over a period of several meetings, that created a Fifth Congressional District in which the black population ranged from 62 to 64 percent of the total population. (Kidd Deposition, 18-19; Defendants' Exhibit PP.) Chairman Wilson summarily rejected the plans, without permitting the other House conferees to review them. (Kidd Deposition, 19, 30.) According to Senator Kidd, the "only input he [Representative Wilson] seemed to have any interest in was the percentage of minority as it would be in that particular Congressional area." (*Id.*, 19.) Plans that contained a Fifth District with more than 51 percent black population simply were "not acceptable and that was it." (*Id.*, 30.) According to one reapportionment staff member, "[Joe Mack Wilson's] job there was just to be stubborn and that's exactly what he was. And he stone-

walled whatever progress could have been made. . . ." (Vey Deposition, 45.)

101. Chairman Wilson's notion of compromise is clearly revealed by his proposed congressional plans, two of which have been identified by the reapportionment staff as House Compromise Plan, September 7, 1981, and House Compromise #2. (Defendants' Exhibit NN and OO.) Both plans contained a Fifth District with a 51.74 percent black population, identical to the House Substitute plan. Chairman Wilson testified that "[he] was hopeful [that he could compromise] at 51 . . . I was hopeful that I wouldn't [have to compromise higher than that.]" (Wilson Deposition, 328-329.)

102. Chairman Wilson elaborated on his position on the Fifth District reapportionment outside the committee meetings. In a conversation with several white Democratic legislators during this time, Chairman Wilson was asked whether reapportionment was settled. He responded, "No. We are still working on that district, Fourth and Fifth District, Julian's district." Wilson would not predict the outcome but stated, " 'I'm not for drawing a nigger district and I'm not for drawing a Republican district.' " (Hudgins Deposition, 10-11.) Chairman Wilson also indicated that he was not in favor of drawing a district that gave blacks in Georgia the opportunity to elect a black Congressman. (Hudgins Deposition, 10-12.)

103. After a seven-day stalemate, the Conference Committee produced its first report which resulted in a Fifth District with a 51.74 percent black population; it was identical to the House plan. (Joint Exhibit 17.) Rep. Wilson refused to consider any other plan. The Senate rejected that report. (Stipulation of Facts, ¶ 31.)

104. The second configuration for the Fifth District drawn by the Conference Committee was the result of Wilson's only compromise on the Fifth District. The plan was virtually unaltered in the succeeding conference reports. The plan split Fulton County into three Congressional districts; north Fulton County was placed in the Fourth Congressionsl District with DeKalb County; the City of Atlanta, including that portion of Atlanta in DeKalb County, and parts of unincorporated south Fulton County constituted the Fifth District; the so-called "Tri-City" area of Hapeville, East Point and Union City (included in Senator Hudson's senatorial district) in South Fulton County was placed in the Sixth Congressional District. The plan also split several municipalities in north and south Fulton County. The concentration of black population in South Fulton and DeKalb counties was split into three congressional districts. (Joint Exhibit 17.) The plan allowed a 57.28 percent black population in the Fifth District.

105. According to several legislators, presentation of the plan calling for a 57 percent black Fifth District was the House leadership's prearranged strategy. According to Senator Kidd, Chairman Joe Mack Wilson jumped rather suddenly to a 57 percent black population in the Fifth District and "indicated very strongly that that's as high as they [the House Conferees] could go." (Kidd Deposition, 40-41.) Representative Elliott testified that "after the Bond plan came over from the Senate with 60-some-odd percent black composition, that the House leadership arrived at this magical 57 percent figure and, by God, they were not going to budge." (Elliott Deposition, 48.) He noted that no logical or legal reason was given for the 57 percent plan.

> The important thing to me it had little or nothing to do with either county lines or community of interests concepts. It was just flat percentage that, by God, this is the highest we are going to go, come hell or high water—no matter what the logical reasons might be for adjusting the black-white ratios in any given percentage. . . .

(Elliott Deposition, 49.) Senator Bond testified that Conference Committee Reports 2-6 provided for a Fifth District with a 57 percent black population because "the House Conferees knew that they [sic] 57 percent black population district was in fact a 46 percent black voting district and that a black candidate for office would be unsuccessful in that district." (Bond Trial Testimony, 577.)

106. The Second Conference Committee Report failed to pass either House. (Stipulation of Facts, ¶¶ 34-35.)

107. The only manner in which the Fifth District configuration changed in subsequent reports was, in the third report, to reunite the City of Alpharetta, at the request of a white Representative, Luther Colbert, and in the fourth report, to place four predominantly white census tracts in that portion of Atlanta which is located in DeKalb County. (Wilson Trial Testimony, 465; Joint Exhibits 18 and 19.)

108. In contrast to the committee acceding to the request of white legislators, request of black legislators to increase the percentage of black population in the Fifth District were ignored. (Randall Deposition, 28-29.)

109. Representative Scott approached Representatives Ham and Wilson and inquired about the possibility of the conferees adopting his 60.87 percent option. Representative Ham replied that his hands were tied, "that he had to

support the chairman's position, Chairman Wilson." (Scott Trial Testimony, 642.) Representative Scott had approached Representative Ham because Senator Kidd had told him that "if the [Black Caucus] would get Ham or one of the other conferees on the House, that he would work on the Senators. It would only take four of the conferees to pass a plan." (Scott Trial Testimony, 642.) Representative Wilson, however, dashed all hopes that the Conferees or the Georgia House would have an opportunity to consider Representative Scott's 60.87 percent plan. According to Representative Scott, Representative Wilson told him that "if you blacks want anything . . . higher than this 57 percent, you better be prepared to get it from the Justice Department or the courts." (*d.*, 641.)

110. Chairman Wilson's opposition to Representative Scott's 60.87 percent option plan was based solely on the percentage of blacks in the Fifth District. In comparing the Scott option to conference Committee Reports 2-6, Representative Wilson acknowledged that: 1) the Scott plan, like the committee plans, placed part of north Fulton County in the Fourth District; 2) the Scott plan included more of south Fulton County in the Fifth District than the committee plans, consistent with the House's reapportionment criteria; and 3) the Scott plan included all of Atlanta/DeKalb in the Fifth District, rather than divide the city as in the committee plans, which was again consistent with the reapportionment criteria. (Wilson Trial Testimony, 472-473.) Chairman Wilson agreed that the single difference was that Representative Scott's plan had a Fifth Congressional District with over a 60 percent black population. (*Id.*, 472.)

111. Representative Thomas Phillips, a white representative from Gwinnett County, received the same treat-

ment as members of the Black Caucus when he prepared a plan during the Conference period that left Gwinnett County intact in the Ninth Congressional District and created a Fifth Congressional District with a 60 percent black population. Phillips had taken copies of his plan to the clerk's office for distribution, but later learned that Speaker Murphy had given instructions to not distribute the congressional plan. After Phillips discovered the order, the Speaker permitted the plan to be distributed. (Phillips Deposition, 26-27.)

112. Representative Phillips introduced the plan in the House on September 15, 1981, after the Fourth Conference Report had been defeated. (Joint Exhibit 16 at 128.) He requested an instruction that the House Conferees take the plan to the Senate Conferees for their consideration. (*Id.*, 30.) When Chairman Wilson learned of Phillips' proposal, he "came storming down the center aisle" and told Phillips, "You keep this up, and we're going to get you goddamned Republicans and get them damned niggers too." (*Id.*, 28; Wall Deposition, 27-28.)

113. Subsequent committee work focused on how to apportion troublesome Gwinnett County and shifted lines to accommodate legislators' interests in the districts of state transportation officers—whose districts are controlled by congressional districts.

114. Conference Report No. 5 made no change in the Fourth and Fifth Districts. The Senate rejected that report.

115. After several Conference Committee reports were defeated, the House and Senate leadership exerted tremendous pressure on legislators to pass a plan. From the well of the House, representatives described the "pressure and arm-twisting on members of this House by the House

Leadership and especially by our Speaker." (Joint Exhibit 16 at 97.) One legislator noted, however, that "Speaker Murphy is a pussycat when compared with Zig Zag Zell [Miller] and his arm-twisters from across the hall." (*Id.*) During the debate on the Fifth Conference Report, which was passed by the House, (Joint Exhibit 12 at 496), Representative Scott stated from the well of the House that:

> I saw one fellow approach my desk over there shaking his arm; I don't know what was wrong with it, I expect he got it twisted. This plan is very much like [the one] we looked at last night with the exception that perhaps enough arms have been twisted that maybe the vote's a lot closer.

(Joint Exhibit 16 at 144.) The same theme was described during the debate of the Sixth Conference Report; Legislators were afraid of being "hurt" if they didn't vote for the leadership plan. (*Id.*, 194).

116. Conference Report No. 6 became Act No. 5 when adopted by the Georgia House and Senate.

117. According to Senate Majority Leader Allgood, several Senators specifically told him that they were going to vote for the Sixth Report because "my district is all right and if we keep on with new plans then sooner or later the dime is going to fall on my district like it has on yours." (Allgood Deposition, 43-44.) A second reason that Senators cited as the basis for their affirmative vote on Conference Report Six was they "[didn't] want to have to go home and explain why I [the Senator] was the leader in getting a black elected to the United States Congress." (*Id.*, 43.)

118. The same sentiment was expressed by members of the House. According to Representative Wall, the Bond

plan was perceived "as an effort to put Julian Bond in the United States Congress and most of those members of the House were not going to have any part of doing that or be a party to doing that." (Wall Deposition, Vol. II, 77-73.) Representative Godbee, a member of the Conference Committee, advised Representative Felton that,

> We [the conferees] didn't really feel that it [Act No. 5] would be approved by the Justice Department but we felt that it would be better politically if we were forced to draw a black district then for us to voluntarily go back and let it be known that we were on a Conference Committee or that even our other colleagues in the House voted for a district to seat a black.

(Felton Deposition, 35.)

119. The only reason the Georgia General Assembly failed to enlarge the black population in the Fifth District more than it did and failed to unite black neighborhoods was solely because the population was of the black race.

120. There was no legitimate, nondiscriminatory reason why the Fifth District was drawn the way it was.

121. Numerous legislators perceive that the Fifth Congressional District under Act No. 5 was adopted for a racially discriminatory purpose. (Bond Trial Testimony, 580; Felton Deposition, 377, 155; Allgood Deposition, 30, 68; Randall Deposition, 55-56; Lowe Deposition, 50-53; Wall Deposition, 33-35, Vol. II, 72.) One legislator stated that "the motivation of the House leadership" in creating the Fifth District under Act No. 5 was to "increase [the percentage of black population] just enough to say they had increased it [and] so that it would look like they had increased it, but they knew they had not increased it enough to elect a black." (Felton Deposition, 155.) According to Representative Lowe, "It was just a fact

that the majority of the members on the floor did not want to draw a black Fifth District." Legislators wanted to keep the Fifth District "as white as possible . . . but just within the limits . . . to satisfy the Voting Rights Act. . . ." (Lowe Deposition, 50.)

122. The purported goals of maintaining "historical borders," preserving county and city lines and avoiding a Republican Fourth District were only pretexts for discrimination. Those goals were ignored when drawing the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Districts. (See Finding ¶ 33, *supra*.) The goal of uniting a cohesive voting bloc was followed in the white mountain district; it was abandoned in the black south Fulton and DeKalb area.

123. The discrimination in this case is explicit and implicit. The contradictions, illogical justifications and feigned ignorance reflected in testimony at trial indicate an attempt to cover-up the true motive of the Georgia General Assembly.

124. The words of Wilson and Hudson speak for themselves insofar as these legislative leaders expressed a strong determination to limit the percentage of the black population in the new Fifth District. Their demeanor while testifying also indicated a lack of candor on their parts. To the extent that their testimony conflicted with other testimony or evidence with respect to the purposes underlying the enactment of Act No. 5, it must be discredited as untrustworthy.

125. The actions of the legislators who adopted Act No. 5 also speak for themselves. The legislators knew a cohesive black community existed in south Fulton and DeKalb Counties, that it would take a 65 percent black

population to allow a black electoral majority and that the Fifth District embodied in the final conference report divided the black community and prevented a black majority. The Fifth District was drawn to suppress black voting strength in Georgia.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear this case. 42 U.S.C. § 1973c; 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 2201.

2. This Court is properly convened as a court of three judges. 42 U.S.C. § 1973c; 28 U.S.C. § 2284.

3. The State of Georgia is subject to the preclearance requirement of Section 5. *Georgia v. United States*, 411 U.S. 526, 527-528 (1993) [sic].

4. If the United States Attorney General refuses to preclear a voting plan submitted to him pursuant to Section 5, the State must obtain a declaratory judgment from this Court before it may implement the plan. 42 U.S.C. § 1973c.

5. In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia v. United States*, 411 U.S. at 538. To sustain that burden, the State of Georgia must demonstrate the absence of both discriminatory purpose and discriminatory effect.

6. The focus of this litigation is on Congressional Districts Five and Four in the Atlanta area. If Plaintiffs can demonstate that the manner in which Districts Five and Four were drawn is free of racially discriminatory purpose and effect, then they are entitled to the relief they seek. No party has contended that the manner in which the remaining eight districts were drawn justifies the denial of the requested declaratory relief.

7. The Fifth District contained in Act No. 5 has a higher black population percentage than under the existing plan, there is no retrogression. Thus, technically, the voting plan does not have a discriminatory effect, as that term has been construed under the Voting Rights Act. *Beer v. United States*, 425 U.S. 141 (1975).

8. Simply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of a discriminatory purpose. *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975); *City of Rome v. United States*, 446 U.S. 156, 172 (1980).

9. The Supreme Court has emphasized the importance of discriminatory purpose in a Section 5 case:

> [I]t may be asked how it could be forbidden by §5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on account of race or color. Congress surely has the power to prevent such gross racial slurs. . . . "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . ." [A voting change] proved to be of this kind and not proved to have a justifiable basis is forbidden by §5, whatever its actual effect may have been or may be.

422 U.S. at 378-379.

10. The Supreme Court in *Beer v. United States*, 425 U.S. 141 (1975), the case in which the nonretrogression test for effect was announced, recognized that nonretro-

gression is not the only test for compliance with the Voting Rights Act. The Court emphasized that even an ameliorative plan would violate Section 5 if it "so discriminates on the basis of race or color as to be unconstitutional." 425 U.S. at 141n.14.

11. A plan is unconstitutional if it is adopted with an invidious discriminatory purpose constituting a denial of equal protection. *State of Mississippi v. United States*, 490 F. Supp. 569, 583 (D.D.C. 1979).

12. If racial purpose "has been a motivating factor in the decision," the State has unconstitutionally denied black citizens equal protection. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-66 (1977).

13. Direct and circumstantial evidence are both relevant to a finding of discriminatory purpose. "[I]nvidious discriminatory purpose may often be inferred from the totality of relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

14. Proof of discriminatory intent requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights, supra*, 429 U.S. at 226.

15. Overt racial statements, present in this case, provide only one basis for finding discriminatory intent. Justice Stevens noted in *Washington v. Davis, supra:* "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." 426 U.S. at 253 (concurring opinion). In this case, the state frag-

mented the large and contiguous black population that exists in the metropolitan area of Atlanta by splitting that population between two Congressional districts, thus minimizing the possibility of electing a black to Congress in the Fifth Congressional District. The impact of this state action is probative of racial purpose.

16. "Evidence of historical discrimination is relevant to drawing an inferrence of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by the courts or made illegal by civil rights legislation, and that they were replaced by practices which, though neutral on their face serve to maintain the status quo." *Rogers v. Lodge*, 50 U.S.L.W. 5041, 5044 (July 1, 1982).

17. The absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, "particularly if the factors usually considered by the decision makers strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. The evidence in this case demonstrates no legitimate nonracial reason for adoption of a Fifth District which split a cohesive black community. Moreover, the purported criteria for apportionment were ignored.

18. The evidence demonstrates that the State attemped to "maximize" the voting strength of persons in other areas whom State officials believe to possess similar communities of interest. For example, the Lieutenant Governor expressly required that the "mountain people" be maintained in one district for the precise reasons that Senator Bond proposed that the black neighborhoods of Fulton-DeKalb be maintained in one district. Thus, although the Voting Rights Act does not require the State

to maximize minority voting strength, if the State determines to implement a policy of preserving "communities of interest" it bears a heavy burden under the Act to demonstrate why such a policy would be implemented in white residential areas but not in black residential areas. "Such unexplained departures from the results that might have been expected to flow from the [State's] own neutral guidelines can lead . . . to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group." *Connor v. Finch*, 431 U.S. 407, 425 (1977). The evidence here of the divergent utilization of the "community of interest" standard is indicative of racially discriminatory intent.

19. Overt racial statements, the conscious minimizing of black voting strength, historical discrimination and the absence of a legitimate nonracial reason for adoption of the plan at issue mandates the conclusions that Act No. 5 as it pertains to the Fourth and Fifth Congressional districts has a discriminatory purpose in violation of Section 5.

20. A plan which is the product of purposeful racial discrimination, "has no legitimacy at all under our Constitution or under [Section 5]." *City of Richmond v. United States, supra*, 422 U.S. at 378-379. *See also Beer v. United States, supra*, 425 U.S. at 141 n. 14; *Donnell v. United States, supra; Hale County v. United States, supra; Mississippi v. United States*, 490 F. Supp. 569, 581, (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980) ("Plaintiff's burden in a suit for declaratory relief under Section 5 is to demonstrate that the reapportionment plan . . . fairly reflects the strength of black voting power as it exists.")

21. In concluding that Plaintiffs have failed to demonstrate that the manner in which the Fifth and Fourth

Districts of Act No. 5 were drawn is not the product of purposeful racial discrimination, the Court expresses no view as to which plan the General Assembly should have adopted. The plan drawing process is a legislative responsibility (*Reynolds v. Sims*, 377 U.S. 533, 587 (1964); *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), but the Voting Rights Act requires that it be carried out without racial discrimination. The record clearly reveals that if the "gross racial slurs" (*City of Richmond v. United States*, *supra*, 422 U.S. at 378) had been eliminated from the reapportionment process, the boundary between Districts Five and Four would have been drawn differently; it is not possible for the Court to conclude which plan might have resulted since such a result would be determined by the nondiscriminatory functioning of the political process. In this case, however, the political process did not function in a nondiscriminatory manner. Blacks, solely because of their race, were excluded from the final decision-making process, (i.e., the Conference Committee); and whites who, for racially discriminatory reasons, opposed the creation of a district which might allow black voters an opportunity to elect a candidate of their choice were entrusted with the decision-making responsibility.

22. The Court's decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area. *See, e.g., Beer v. United States*, *supra*, 425 U.S. at 140-142; *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979). The State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as racially discriminatory purpose is absent from the process. Act No. 5 is being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to

the extent possible; the plan drawing process was not free of racially discriminatory purpose.

23. The Plaintiffs have failed to satisfy their burden of demonstrating that the reapportionment was nondiscriminatory in purpose. Thus, the State of Georgia is not entitled to the declaratory relief sought in this litigation.

24. In recognition of the fact that "there must be an election in November for the members of the United States House of Representatives" (May 3, 1982 Opinion of the Georgia Attorney General, at 2-3), the Court will retain jurisdiction of this action to allow the Plaintiffs to submit to this Court within twenty (20) days of the date of this Order, a revised plan for the conduct of said election, which plan satisfies the requirements of the Voting Rights Act.

25. An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

/s/ HARRY T. EDWARDS
Harry T. Edwards
United States Circuit Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

/s/ JUNE L. GREEN
June L. Green
United States District Judge

DATE: July 22, 1982

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, et al., *Plaintiffs* v. WILLIAM FRENCH SMITH, et al., *Defendants* WILLIAM C. (BILLY) RANDALL, JR., et al., *Intervenor-Defendants*	CIVIL ACTION 82-0665

ORDER

Upon consideration of the Findings of Fact and Conclusions of Law entered this date, and of the entire record herein, it is by the Court this 22nd day of July, 1982,

DECLARED, that Act No. 5 of the 1981 Extraordinary Session of the Georgia General Assembly was enacted with the purpose of denying or abridging the right to vote on account of race; and it is

ORDERED, that Plaintiffs' request for a declaratory judgment that Act No. 5 of the 1981 Extraordinary Session of the Georgia General Assembly does not violate Section 5 of the Voting Rights Act of 1965 be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiffs are enjoined from implementing Act No. 5 in any fashion insofar as it affects the Fourth and Fifth Congressional Districts; and it is

FURTHER ORDERED, that on or before August 11, 1982 Plaintiffs shall submit to the Court for its approval a

reapportionment of the Fourth and Fifth Congressional Districts.

/s/ HARRY T. EDWARDS
Harry T. Edwards
United States Circuit Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

/s/ JUNE L. GREEN
June L. Green
United States District Judge

PART II

NOTICE OF APPEAL

[Filed in Clerk's Office July 26, 1982.
By: Clerk, U.S. District Court, District of Columbia]

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE D. BUSBEE, et al., *Plaintiffs*, v WILLIAM FRENCH SMITH, et al., *Defendants*, WILLIAM C. (BILLY) RANDALL, JR., et al., *Defendant-Intervenors.*	CIVIL ACTION NO. 82-0665

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 26th day of July, 1982, that Governor George D. Busbee, Lieutenant Governor Zell Miller, Attorney General Michael J. Bowers, Speaker of the House Thomas B. Murphy, and the State of Georgia, Plaintiffs in the above-styled case, hereby appeal to the Supreme Court of the United States from the Order of July 22, 1982, which, *inter alia*, declared that Georgia's congressional redistricting plan, as it pertains to the 4th and 5th Congressional Districts (Act No. 5, 1981 Extraordinary Session), has the purpose of denying or abridging the right to vote on account of race, and enjoined Plaintiffs from implementing said plan insofar as it affects the 4th and 5th Congressional Districts.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant Attorney General

/s/ H. PERRY MICHAEL
H. PERRY MICHAEL
Senior Assistant Attorney General

/s/ CAROL ATHA COSGROVE
CAROL ATHA COSGROVE
Senior Assistant Attorney General

/s/ MARK H. COHEN
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CERTIFICATE OF SERVICE

I, MARK H. COHEN, Staff Assistant Attorney General for the State of Georgia, do hereby certify that I have this day served the within and foregoing NOTICE OF APPEAL upon Defendants, by hand-delivering a copy of same to:

PAUL HANCOCK
U.S. Department of Justice
320 First Street, N.W.
Washington, DC 20530

and upon Defendant-Intervenors by hand-delivering a copy of same to:

LAUGHLIN McDONALD
52 Fairlie Street, N.W.
Suite 355
Atlanta, GA 30303

This 26th day of July, 1982.

/s/ MARK H. COHEN
MARK H. COHEN
Staff Assistant Attorney General

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-857

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE D. BUSBEE, ET AL., APPELLANTS

v.

WILLIAM FRENCH SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether a congressional reapportionment plan enacted with discriminatory purpose violates Section 5 of the Voting Rights Act of 1965, although it has no retrogressive effect.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Beer v. *United States*, 425 U.S. 130 ..... 2, 3, 4, 5

City of Port Arthur v. *United States*, No. 81-708 (Dec. 13, 1982) 4, 5

City of Richmond v. *United States*, 422 U.S. 358 ..... 3, 4, 6

City of Rome v. *United States*, 446 U.S. 156 4

Georgia v. *United States*, 411 U.S. 526 4

Perkins v. *Matthews*, 400 U.S. 379 4

Statute:

Voting Rights Act of 1965, Section 5, 42 U.S.C. 1973c 2, 3, 4, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-857

GEORGE D. BUSBEE, ET AL., APPELLANTS

v.

WILLIAM FRENCH SMITH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

The Attorney General moves pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the district court.

OPINION BELOW

The district court's opinion (J.S. App. 1a-49a) is reported at 549 F. Supp. 494.

JURISDICTION

The district court's opinion and order denying declaratory relief were entered on July 22, 1982 (J.S. App. 1a-51a). The notice of appeal was filed on July 26, 1982 (J.S. App. 52a-53a). On September 8, 1982, this Court granted appellants' motion for an extension of time to November 23, 1982, to file the Jurisdictional Statement, and it was filed on November 22, 1982. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATEMENT

1. Following the 1980 census, the State of Georgia determined that it would have to reapportion its congressional districts to comply with the one-person, one-vote rule (J.S. App. 2a). The state legislature enacted a reapportionment plan, Act No. 5, on September 22, 1981 (*ibid.*), and submitted the plan to the Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965 (*id.* at 1a).[1]

On February 11, 1982, Assistant Attorney General Reynolds, acting on behalf of the Attorney General, entered an objection to Act No. 5 (J.S. App. 1a). The basis for that objection was the Assistant Attorney General's inability to conclude that in drawing the line between the Fourth and Fifth Congressional Districts, the legislature did not have the discriminatory purpose of minimizing black voting strength in the Fifth District (J.S. 8-9).[2] Because the State had failed to meet its obligation under Section 5 to demonstrate the absence of discriminatory purpose, as well as discriminatory effect, the Assistant Attorney General denied preclearance (J.S. 9).

2. On March 8, 1982, appellants filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that Act No. 5 did not violate Section 5 (J.S. 9). After a four-day trial (*ibid.*), the three-judge court

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[1]Section 5 prohibits covered jurisdictions, including the State of Georgia, from enacting or seeking to administer any "standard, practice, or procedure with respect to voting" unless it is precleared by the Attorney General or unless the District Court for the District of Columbia issues a declaratory judgment that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. 1973c.

[2]The Assistant Attorney General concluded that because Act No. 5 increased the black population in the Fifth District, it did not have the retrogressive effect prohibited by Section 5 (J.S. 8-9). See *Beer* v. *United States*, 425 U.S. 130 (1976).

concluded, in a unanimous opinion with detailed factual findings regarding the enactment of Act No. 5 (J.S. App. 2a-43a), that while the plan was not retrogressive within the meaning of *Beer* v. *United States*, *supra*, (*id.* at 44a), the boundaries of Congressional Districts Four and Five had been drawn with a racially discriminatory purpose in violation of Section 5 (*id.* at 47a).

The court emphasized that reapportionment is a legislative responsibility, but that reapportionment must, pursuant to the Voting Rights Act of 1965, be conducted without racial discrimination (J.S. App. 48a). The court expressed no opinion on what plan would have emerged from a process free of discrimination, but found it clear from the record that such a process would have produced different boundaries (*ibid.*). The court accordingly denied the State's request for declaratory relief, and enjoined the State from implementing its plan for redistricting the Fourth and Fifth Districts (*id.* at 50a-51a).[3] On August 2, 1982, this Court denied appellants' application for a stay of the injunction (Justice Brennan, and Justice Stevens, on resubmission).[4]

ARGUMENT

Relying on *Beer* v. *United States*, 425 U.S. 130 (1976), and *City of Richmond* v. *United States*, 422 U.S. 358 (1975), appellants urge that the district court erred in concluding that Act No. 5 contravenes Section 5 of the Voting

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[3]The State later received the court's approval of an alternative plan for apportioning the Fourth and Fifth Districts; the legislation enacting that plan provides that it will become ineffective, and Act No. 5 will be reinstated, in the event that this Court reverses the district court's judgment (J.S. 10 n.5).

[4]An earlier request for a stay of a prior injunctive order was denied by the Chief Justice on May 25, 1982, and by Justice Rehnquist on June 1, 1982.

Rights Act of 1965 because it was enacted with discriminatory purpose (J.S. 10-22). That contention is not only based on a misreading of *Beer* and *City of Richmond*, it is contrary to the express language of Section 5, which provides that in order to obtain preclearance of a proposed electoral change, a covered jurisdiction must prove the absence of *both* discriminatory effect and purpose (42 U.S.C. 1973c). This Court has consistently recognized the two parts of the statutory standard. *City of Port Arthur* v. *United States*, No. 81-708 (Dec. 13, 1982), slip op. 8; *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980); *Beer* v. *United States*, *supra*, 425 U.S. at 136, 141; *City of Richmond* v. *United States*, *supra*, 422 U.S. at 372; *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *Perkins* v. *Matthews*, 400 U.S. 379, 387, 388 (1971). Appellants seek to drain Section 5 of half its meaning by arguing that if a change does not have the *effect* of diminishing the voting strength of blacks, it cannot violate Section 5, regardless of the *purpose* with which it was enacted.

In *City of Richmond*, *supra*, this Court concluded that Richmond's annexation of additional territory did not have a discriminatory effect under Section 5, but it remanded the case for consideration whether that annexation was motivated by a discriminatory purpose, explaining that Congress explicitly prohibited changes with a discriminatory purpose, whether or not they produced retrogression, because purposeful discrimination always represents a "gross racial slur[]" on black citizens (422 U.S. at 378).

Appellants attempt to distinguish the plain meaning of *City of Richmond* by arguing (J.S. 18) that it predates *Beer*, in which it was described as a case that "decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5" (*Beer* v. *United States*, *supra*, 425 U.S. at 139 n.11). But nothing in *Beer* is inconsistent with the language of *City of Richmond*, nor

does it purport to narrow the meaning of that case.[5] Indeed, the principle that discriminatory intent, by itself, bars Section 5 preclearance has recently been reaffirmed by this Court in *City of Port Arthur* v. *United States, supra*, slip op. 8-9.

The district court here correctly noted (J.S. App. 44a-45a) that in *Beer* this Court recognized that nonretrogression is not the only test for compliance with the Voting Rights Act of 1965. Even an ameliorative plan violates Section 5 if it so discriminates on the basis of race or color as to be unconstitutional. *Beer* v. *United States, supra*, 425 U.S. at 141 n.12. Thus, under *Beer*, although Act No. 5 does not produce a retrogression in the Fifth Congressional District, it violates Section 5 because, as the district court found, it was adopted with the intent of minimizing black voting strength in the Fifth District, and that "invidious discriminatory purpose" violates the Constitution (J.S. App. 45a).

The core of appellants' argument is that the only discriminatory purpose that violates Section 5 is a purpose to "reduc[e] the present level of black voting strength" (J.S. 22)—i.e., to cause retrogression. This extreme position ignores the adverse consequences to minorities who are the victims of purposefully discriminatory conduct, even conduct that is not retrogressive. As the district court found, the purposefully discriminatory conduct in this case deprived minority voters of the degree of voting strength that would have been theirs but for the improper consideration of race

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[5]It is clear that the retrogression requirement in *Beer* applies only to the "effect" aspect of Section 5, not to the "purpose" aspect. On remand in *Beer*, all parties agreed that the question whether the New Orleans reapportionment plan had a discriminatory purpose remained to be decided (see also 425 U.S. at 136 n.7). On July 29, 1976, the district court issued a declaratory judgment holding that it did not (Civil Action No. 1495-73).

(J.S. App. 47a-49a). Absent racial discrimination, Georgia might well have adopted a plan that would have placed a majority of black voters in the Fifth District, rather than one under which the majority of voters in that district remained white. Thus, minority voters may have been deprived by an impermissible consideration of race of their only realistic chance to elect a candidate of their choice.[6]

The district court correctly applied well-settled principles under Section 5, and appellants have presented no question warranting plenary review by this Court. Accordingly, the district court's judgment should be affirmed.

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[6]Moreover, as this Court explained in *City of Richmond, supra*, 422 U.S. at 378:

> [I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1982

GEORGE D. BUSBEE, ET AL.,
Appellants,

vs.

WILLIAM FRENCH SMITH, ET AL.,
Appellees,

and

WILLIAM C. (BILLY) RANDALL, JR., ET AL.,
Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Georgia's 1981 Congressional reapportionment, found by the Three-Judge Court to be the product of intentional racial discrimination and "designed to minimize black voting strength to the extent possible," was properly denied preclearance under Section 5 of the Voting Rights Act of 1965?

2. Whether in the absence of any showing that its 1981 Congressional reapportionment provided blacks equal access to the political process, the State of Georgia was not entitled to preclearance under the "effect test" of Section 5, as amended in 1982?

TABLE OF CONTENTS

	Page
Table of Authorities.....	iii
Motion to Affirm.....	1
Statement of the Case	
I. Proceedings Below.....	1
II. The Facts.....	4
Argument	
I. The District Court Properly Denied The State Of Georgia Declaratory Relief Under Section 5 Because Of The Overwhelming Evidence That Act No. 5 Was Passed For The Purpose Of Minimizing The Chances Of A Black Candidate Being Elected To Congress, And Because The Court Found That Racially Discriminatory Purposes Were The Sole Reason That Explained The Boundary Line Between The Fourth And Fifth Districts.....	30
II. In The Absence Of Any Showing By The State of Georgia That Act No. 5 Gave Blacks Equal Access To The Political Process, The State Was Not Entitled to A Declaratory Judgment Under The "Effect Test" Of Section 5, As Amended In 1982.....	39
Conclusion	45

TABLE OF AUTHORITIES

Cases	Page
Beer v. United States, 435 U.S. 130 (1976)	31, 39
City of Mobile v. Bolden, 446 U.S. 55 (1980)	32, 39
City of Richmond v. United States, 422 U.S. 358 (1975)	32, 33
Rogers v. Lodge, ___ U.S. ____, 102 S. Ct. 3272 (1982)	32, 34
Smith v. Allwright, 321 U.S. 649 (1944)	6
Wesberry v. Sanders, 376 U.S. 1 (1964)	7
Statutes	
42 U.S.C. 1973 c.....	passim
42 U.S.C. 1973	39, 40
Ga. Laws of 1873, p. 226	34
Ga. Laws of 1911, p. 390	34
Ga. Laws of 1981, Act No. 5, Extraordinary Session	passim

TABLE OF AUTHORITIES (continued)

	Page
Other	
Rule 16, Rules of the Supreme Court	1
Rule 24, Fed. R. Civ. P.	2
House Report No. 227, 97th Cong., 1st Sess. (1981)	40
Senate Report No. 417, 97th Cong., 2nd Sess. (1982)	40, 41

MOTION TO AFFIRM

Intervenor-Appellees, pursuant to Rule 16, hereby move that the judgment of the United States District Court for the District of Columbia be affirmed on the grounds that the evidence of racially motivated action by the Appellants was overwhelming, that the issues raised by the Appellants are frivolous, and that the questions are so insubstantial that argument is unwarranted.

STATEMENT OF THE CASE

Proceedings Below

On March 8, 1982, the State of Georgia and various of its officials (Appellants) filed an action in the United States District Court for the District of Columbia seeking Section 5 approval of Georgia's 1981 Congressional reapportionment plan. Immediately

thereafter, Intervenors filed a Petition to Intervene, which was granted pursuant to Rule 24, Fed.R.Civ.P. Intervenors are a group of 21 black registered voters who reside in the State of Georgia, including 18 black members of the House and Senate of the Georgia General Assembly.

On May 3, 1982, the Attorney General of Georgia advised the State to proceed with elections under Act No. 5, notwithstanding the the fact that it had not been approved under Section 5 of the Voting Rights Act of 1965. The Intervenors and the United States filed motions to enjoin the State from implementing Act No. 5, and the three-judge court enjoined the State from proceeding on May 24, 1982. On May 25, 1982, the State applied for a stay of that order to the Circuit Justice, the Honorable Chief Justice Warren E. Burger. Chief

Justice Burger denied the State's application. The State next applied for a stay to the Honorable William H. Rehnquist, who also denied the application. (J.S.A.2)

Trial on the merits was held before the three-judge court from June 28 through July 1, 1982. In addition to the live evidence at trial, the parties introduced voluminous deposition testimony of more than 30 witnesses. The district court denied pre-clearance by order of July 22, 1982, and a stay of that order was denied by the Honorable William J. Brennan, Jr., and the Honorable John P. Stevens.

The Georgia General Assembly then enacted a new reapportionment plan that did not split the black community in the Atlanta area, and this plan was then approved under Section 5 with the consent of the Intervenors and the United States. In this appeal, the State continues to seek approval of the original Act No. 5.

The Facts

1. Background. During the 1981 Special Session, the Georgia Senate passed a bill that kept intact the cohesive black community in metropolitan Atlanta, which is contained in both Fulton and DeKalb Counties. This plan created a Fifth Congressional District that was 69% black by population. (J.S.A. 19-24) The House of Representatives, however, passed a bill that split the black community into three separate Congressional districts, the Fourth, the Fifth, and the Sixth. Under the House bill, the total black population in the Fifth Congressional District was only 51.7%.

A conference committee was convened to resolve the difference between the House and Senate concerning the percentage of blacks in the Fifth District. The General Assembly ultimately passed a reapportionment plan with a Fifth Congressional District that

contained a black population of 57% (J.S.A. 36-40), pursuant to a conference committee report.

Although nominally a majority black district, the Fifth Congressional District in Act No. 5 contained a majority of whites based on the voting population. Whites were 54% of the registered voters (J.S.A. 3) and nearly 60% of the actual voters. (T. 680-81)

The State of Georgia submitted its congressional reapportionment plan administratively to the Attorney General, who interposed an objection to Act No. 5 because the State had apparently divided the black community in Atlanta in order to minimize the possibility of electing a black Congressman. (J.Ex. 25, p. 3).

2. The Historical Opposition to Black Voting Strength in Atlanta's Fifth Congressional District. Since the white primary was abolished in Georgia following

this Court's decision in Smith v. Allwright, 321 U.S. 649 (1944), the State of Georgia and its agents have engaged in a pattern of continued opposition to the voting strength of blacks in Atlanta's Fifth Congressional District. The Democratic Party instituted a county unit vote after the white primary was struck down. Under this system, two adjoining counties that were dominated by white voters were joined with Fulton County in one congressional district. The two additional counties were given more county unit votes than Fulton County even though their population was slight by comparison. (T. 661-63). The county unit system negated the black vote in Fulton County, and it was adopted for the specific purpose of discriminating against black voters in the Atlanta metropolitan area. (T. 661-62).

After the elimination of the county unit system, the districts were malapportioned

to continue the "dilution" of black voters in the Atlanta area. That malapportionment was not eliminated until this Court's decision in Wesberry v. Sanders, 376 U.S. 1 (1964).

With the advent of one person, one vote, and the reapportionments necessitated by that rule, State legislators were preoccupied with efforts to minimize the ability of blacks to participate in the political process in the Atlanta area. (T. 668-72). When congressional reapportionment occurred in 1971, race was the overt issue insofar as the Fifth Congressional District was concerned. (Ex. I.D. HHH, III, JJJ, KKK, LLL, NNN, OOO, PPP, QQQ, RRR, SSS). The General Assembly intentionally drew the Fifth Congressional District to exclude Andrew Young and other prominent blacks from the district, and also split the black community among three congressional districts

(the Fourth, Fifth and Sixth) in order to minimize the black percentage in the Fifth District. (T. 133; Andrew Young Dep. 29-31; J. Ex. 1). This plan was then objected to by the Attorney General when submitted under Section 5. The General Assembly revised the Congressional reapportionment by restoring some of the black areas to the Fifth District, including Andrew Young's residence. Although the Attorney General then precleared the revised legislation, some of the black areas that had been removed from the Fifth District for invidious purposes remained outside that district. (T. 674).

In the 1970 Congressional reapportionment, Julian Bond--then a State Representative, now a State Senator and Intervenor--was a focus of racist opposition to a blacker Fifth Congressional District.

Whites who opposed more blacks in the Fifth District in the 1971 and 1972 sessions used the "Julian Bond argument" to bring support to their position. They argued that raising the black percentage was an effort to get Bond in Congress, and this was an effective racially motivated tactic. (T. 675; Exhibits I.D. HHH, JJJ, KKK, LLL).

3. Congressional Reapportionment in the Georgia Senate, 1981. In the Senate, three individuals were active in trying to create a congressional reapportionment plan that would allow a black candidate a fair opportunity to be elected to Congress, Senators Julian Bond, Paul Coverdell, and Majority Leader, Thomas Allgood. Senator Coverdell, who is a white Republican, was opposed to the present Fourth and Fifth Congressional districts "because they prevent two large and cohesive communities

in this area from expressing their political views;" these two communities were the "black community in Atlanta, Fulton County and DeKalb County and the white suburban community in Fulton and DeKalb Counties." (Nalls Dep. 84).

Senator Allgood, with the tremendous power that inheres in his position as Majority Leader, provided the political clout that enabled what became known as "the Bond Plan" to pass in the Senate. Allgood had assumed "all along that any plan for Congressional reapportionment would take [the increased black population in South Fulton and South DeKalb Counties] into consideration because anyone who's familiar with Atlanta and DeKalb County is aware of the fact that those areas have become far more substantially black in the past ten years than they were before." (Allgood Dep. 13-16). Senator Allgood

testified that the other plans being considered did not give a black a reasonable chance of being elected, that "a black had a very remote possibility of being elected" in the Fifth District contained in Act No. 5, that the House had drawn a plan "for the purpose of reducing minority population," that the House's plan was "flagrantly discriminatory," and that some senators would face opposition in their home districts because they favored the Bond Plan. (Allgood Dep. 16, 21-23, 25, 30, 35-36, 44-45) The Bond Plan created a 69% black Fifth Congressional District, and it sought to group together areas with similar socio-economic considerations, similar neighborhoods, and to group people together on the basis of their "community of interests." (Id. 31-34; J.S.A. 20)

The Senate ultimately passed the Bond amendment, and Senate conferees were

appointed to try to resolve the differences between the Senate and House plans, the latter of which provided only a 51% black Fifth District. Of the three conferees from the Senate, Perry Hudson, Terrell Starr, and Culver Kidd, two were adamantly opposed to the Bond Plan. (J.S.A. 32-33). As Senator Hudson admitted, "I would like to make it very plain that I did not like Julian Bond's plan at that stage of the game. . . ." (Hudson Dep. 164) Hudson did not support any 65% black Congressional district. (Hudson Dep. 259, 261-262)

The second Senate conferee, Terrell Starr, opposed the Bond Plan even though he admitted that the common interests of the people were important when it came to drawing congressional lines for other districts. (Starr Dep. 121-23) He did not support creating 65% black congressional districts. (Starr Dep. 120) Senators Starr

and Hudson opposed the Bond Plan because it created an opportunity to elect a black to Congress. (J.S.A. 21)

The third Senate conferee, Culver Kidd, supported the Bond amendment because of his "feeling" that it was "right" and was "the reasonable, fair way to draw those lines according to the percentages of minority groups." (Kidd Dep. 14)

All six conferees, House and Senate, focused on only one criterion, and that was the racial percentage in the Fifth District. (Kidd Dep. at 19-21, 39-40, 42-43) The conferees other than Senator Kidd mentioned that a higher black percentage could result in electing a black congressman, and they were opposed to that. (Id.) The Senate's 69% black Fifth District plan was not taken seriously during the conference committee meetings. (Nall Dep. 136-137)

Senator Kidd testified that the House conferees were dominated by Joe Mack Wilson (Kidd Dep. 17-19, 30-31), and that the House conferees set an absolute maximum of a 57% black district above which they would not go. (Id. 19, 40) The Senate conferees reported to Majority Leader Allgood that the House would not agree to create a congressional district in which a black could win. (Allgood Dep. 38)

Ultimately, five conference reports were defeated in the House, Senate or both, before a sixth conference report was finally passed, thus becoming Act No. 5. Majority Leader Allgood had found it increasingly difficult to maintain a Senate vote in favor of a higher black percentage district as the conference process continued. Senators feared being perceived as supporting the election of a black congressperson from Georgia. They were worried that this would

hurt them in their home districts. Senators told Allgood that, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." (Allgood Dep. 42-43, 44-45) (J.S.A. 40)

Some members of the Senate stated that if Georgia had to have a majority black Fifth Congressional District, it was better to have it forced upon them by the Justice Department rather than do it voluntarily. (Allgood Dep. 58-59)

4. Reapportionment in the House of Representatives, 1981. The Georgia House is under the autocratic control of the Speaker, Tom Murphy, and a small group referred to as "the Leadership." (Elliott Dep. 9-15) In the case of reapportionment, the House was under the control of Joe Mack Wilson, the Chairman of the House Reapportionment Committee. Wilson was in "total

command" of the reapportionment process. (Randall Dep. 80)

Representative Wilson exercised tremendous control over the other members in the House by threatening to gerrymander them out of their districts if they did not go along with his desires. Representative Elliott testified that: "It was generally perceived that if a member did not go along with the particular plan desired by the Democratic leadership, that member's own House district might be in jeopardy." (Elliott Dep. 25, 57-58) The Members were afraid not only that their own House districts would be modified, but that their area would be moved to an undesirable Congressional district as punishment. (Elliott Dep. 58-59; Phillips Dep. 13)

Representative Phillips from Gwinnett County testified that Wilson told him:

> On several occasions the Gwinnett delegation was threatened with having our county split if we did not support a certain measure, whatever that measure might be on the floor of the House at that time. (Phillips Dep. 13)

Some of the conference committee reports were specifically designed to manipulate the congressional districts in which certain representatives lived in an effort to intimidate them to vote for Joe Mack Wilson's position. As Phillips testified:

> [These conference reports were] nothing more than an effort to show some of the members of the House that the Conference Committee could do whatever they well pleased and that if they didn't get cooperative with the Conference Committee they might wind up in a Congressional district which they did not like. (Phillips Dep. 20-21)

Representative Vinson Wall, who was the Secretary of the House Reapportionment Committee, testified that Wilson had complete control over the process, and that "the Committee did not buck the Chairman as such." Wilson

never lost a vote in the Committee. (Wall Dep. 9-10) Wall testified that:

> [Y]ou didn't do anything in that Committee so far as presenting plans unless it had, basically, his [Wilson's] okay. That goes to House plans, our own House of Representatives' plans, as well as the Congressional. You know, if you don't have his approval, it's not going to fly. (Wall Dep. 8-9)

When reapportionment bills reached the House floor, Wilson served as "the floor manager of all the reapportionment bills;" the House would normally "uphold the floor manager's position;" people were "afraid to buck him;" and they were afraid "if they bucked him, they knew that in all likelihood they would have problems with their own districts." (Wall Dep. 11-12) The problem would be that they would have their own districts "drawn in a way that you can't survive politically." Wilson would see that "the district would be divided or put into

areas that were completely new territory to some people." (Id. 11-12)

In one instance, Representative Scott, who is black, was going to introduce a plan, and Joe Mack Wilson said to Wall, "[h]ow did those damn niggers get that plan?" (Phillips Dep. 111-12)

5. General Evidence of Racial Motivations in Act No.5. Racism is pervasive in the Georgia General Assembly. The terms "nigger" and "black" are used synonymously in the House. (Lowe Dep. 31; Phillips Dep. 35-36; Wall Dep. 41-42; Elliott Dep. 54) Legislation that might benefit blacks is usually referred to as "nigger legislation," or "nigger bills." (Wall Dep. 31-32)

Representative Phillips testified that legislation in the House "has been represented as being a nigger bill or nigger legislation," and that this would include legislation dealing with "social issues, voting

legislation, voting registration type things, legislation dealing with health issues, welfare, for example, Grady Hospital, welfare payments, AFDC type things." (Phillips Dep. 36) Representative Phillips also testified, "[t]hat's the general consensus of the House, a lot of the members of the House." (Phillips Dep. 101)

Much evidence of racism in the legislature focused on Representative Joe Mack Wilson since he was the man who controlled the House of Representatives and thwarted the creation of a Fifth Congressional District with a majority of black voters. Joe Mack Wilson was roundly described as a racist by both whites and blacks. (Nalls Dep. 11, 90-91; Phillips Dep. 34-35; Wall Dep. 19, Vol. II, 57-59, 60, 95; Elliott Dep. 50-51; Holmes Dep. 45-46, 49) The district court agreed. (J.S.A. 7-8)

Chairman Wilson openly stated his prejudice to a member of the House Reapportionment Committee.

> Q. What informal greeting did [Wilson] give you when he joined the Committee?
>
> A. He said that if there was anything he hated worse than blacks and he didn't use the word blacks, he said it was Republicans.
>
> Q. What was the word he used?
>
> A. Niggers. (Felton Dep. 14)

Representative Felton testified that there was extensive racially motivated resistance to black state legislative districts in the Atlanta metropolitan area. (Felton Dep. 24-25)

There were "legislators who would prefer not to have as many blacks" elected to office; they "were not interested in drawing additional black seats;" and one of the three House conferees, John Godbee, told her that he knew that it took "65

percent black to elect a black" in the Fifth District. Godbee also said that the proposed district would probably not "be approved by the Justice Department," but that "it would be better politically if we were forced to draw a black district than for us to voluntarily go back and let it be known that we were on a Conference Committee or that even our other colleagues in the House voted for a district to seat a black." (Felton Dep. 24-25a, 35) Rep. Felton testified that the 69% black Fifth District plan was rejected in order to not "draw a black district, I'm sure of that. There was no really other concern." (Id. 37)

Chairman Wilson barely denied his racist views. He admitted to the use of the word "nigger."

Q. What do you mean by that when you use it?

A. How do I use it?

Q. Yes.

A. Never in any ugly sort of way to put down you or any black man by calling him a nigger. I hear them calling each other the same thing. Now, what they mean by it to each other, I don't know, but to me it's just another expression for a black man.

Q. You could use black, Negro, colored, or nigger interchangably, then?

A. Yes.

* * * *

Q. And you would use them in pretty much the same way, wouldn't you?

A. I never use the word "nigger" that I wasn't smiling or use it in a way that had no hatred or anything in my heart. Y'all have been trying to pin it on me here for a few days, but that's not a part of my make-up.

(Wilson Dep. 660-661)

Representative Lowe, who is white, testified that Joe Jack Wilson would not create any black districts that he was not compelled to do by law. (Lowe Dep. 28)

Chairman Wilson made such comments on the floor of the House when discussing Congressional reapportionment. He made a similar comment to Representative Lowe on another occasion concerning reapportionment of the House of Representatives. (Lowe Dep. 29).

Representative Lowe further testified that there was "a concern among whites in the Legislature about blacks in Fulton County-DeKalb area achieving power," that members of the General Assembly "did not want to draw an equitable number of black districts," and that Chairman Wilson normally referred to blacks as niggers. (Lowe Dep. 33-34) Representative Lowe testified that, after the Justice Department had objected to the Congressional plan, Chairman Joe Mack Wilson stated to her that "he did not intend to draw amy more black districts or

Republican districts than he had to."

(Lowe Dep. 35-36) Wilson also stated to Lowe:

> I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it.
> (Lowe Dep. 36)

Representative Lowe further testified that "the majority of the members on the floor [of the House] did not want to draw a black Fifth District," that they wanted to keep the Fifth District "as white as possible," and they wanted "to keep the percentage [of blacks] as low as possible." (Lowe Dep. 50-51)

Representative Wall testified that the Bond Plan was perceived in the House as the kind of "nigger legislation" that spells defeat.

> Q. Was the effort to increase the representation of blacks in the Fifth Congressional District perceived as nigger legislation as a matter of fact, Rep. Wall?
> . . . .
>
> A. It was. It was view[ed] primarily as an effort to put

Julian Bond in the U.S. Congress and most of those members of the House were not going to have any part of doing that or be a party to doing that.

Q. Putting Julian Bond in the Congress?

A. Yes, since it was his plan.

Q. Is this the kind of legislation that you testified about where somebody could be hurt in a district if they are perceived as supporting it?

A. Right. (Wall Dep. 33)

Representative Wall further testified that the basis for the opposition was the possibility of electing a black. (Wall Dep. 34-35)

Wall was also present when Joe Mack Wilson learned that Representative Phillips was presenting a plan to the House during the time when the Conference Committees were meeting. Phillips' plan would have created a 60% black district, and would have kept Gwinnett County intact. Wall testified that the representatives from the

Gwinnett delegation were standing at their desks discussing the motion, that Joe Mack Wilson came onto the House floor, saw whose name was on the plan, and came "charging down the center aisle and wanted to know what in the hell was going on." (Wall Dep. 28) Phillips told Chairman Wilson what he was doing, and then:

> [A]t that point, he just blew up, Joe Mack blew up and got mad and ferocious and more or less said to Tom, he said, we're going to get you goddamn Republicans and then we're going to fix the niggers. (Wall Dep. 28)

Senator Floyd Hudgins testified that Joe Mack Wilson said to him:

> Well, Floyd, I don't know what we can do or what's going to be the outcome of this because the Justice Department is trying to make us draw nigger districts and I don't want to draw any nigger districts. (Hudgins Dep. 7-8) (J.S.A. 9)

Senator Hudgins further testified:

> We said "What's going to happen?" [Wilson] said, "I don't know, but

> I'm not for drawing nigger districts and I'm not for drawing a Republican district. . . ."
>
> I asked him how come he didn't just draw a district that gave the blacks in Georgia the majority of the people so that they could elect a black representative; that they had ten seats and the blacks were 30% of the population. It looked to me like one out of ten wouldn't be bad.
>
> He said he wasn't for that; that wasn't going to happen or something of that nature. . . .
> (Hudgins Dep. 11-12) (J.S.A. 35)

Representative Holmes also testified that he overheard a white DeKalb legislator, Ken Workman, comment in connection with a Fifth District plan:

> I'm not going to support this plan that will, you know, provide that high percentage of niggers in this district, in this Congressional district. (Holmes Dep. 36)

Intervenor William Randall testified that the Bond Plan would have no chance of passage in the House because:

> [The political reality] is that it would have given the blacks an equal chance, an equal chance of being elected from the Fifth, and I don't think that was the desire of the majority of the members of the House of Representatives. (Randall Dep. 26)

Randall further testified that the opposition to the Bond Plan was "racially motivated" in the House; that the House members were opposed to allowing districts "to be drafted in such a manner to afford a black an opportunity to get elected;" and that he heard conversations to the effect that "it would be Julian Bond's district if he would run for it." (Randall Dep. 53-54)

When the General Assembly finally passed Act No. 5, it was understood by many that their action "was improper under the Voting Rights Act." (Wall Dep. 38) There was a consensus in the House that Act No. 5 would be "thrown out." (Wall Dep., Vol. II, p. 76).

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED THE STATE OF GEORGIA DECLARTORY RELIEF UNDER SECTION 5 BECAUSE OF THE OVERWHELMING EVIDENCE THAT ACT NO. 5 WAS PASSED FOR THE PURPOSE OF MINIMIZING THE CHANCES OF A BLACK CANDIDATE BEING ELECTED TO CONGRESS, AND BECAUSE THE COURT FOUND THAT RACIALLY DISCRIMINATORY PURPOSES WERE THE SOLE REASON THAT EXPLAINED THE BOUNDARY LINE BETWEEN THE FOURTH AND FIFTH DISTRICTS.

The State's argument in this case is a simple one. Georgia contends that it is entitled to prevail--regardless of the actual purposes and motivations that lay behind Act No. 5--because Act. No. 5 did not put black voters in a worse position than they were under the previous law. Absent such a technical "retrogression," the Appellants contend that Section 5 of the Voting Rights Act is completely irrelevant to their actions.

The State's contention is wholly without merit. It ignores the plain language of the statute, the legislative history of the provision, the decisions of this Court, and all of the evidence and findings in this case. Section 5 expressly denies the State the right to implement legislation such as Act No. 5 unless it proves that the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." Appellants rely on this Court's decision in Beer v. United States, 435 U.S. 130 (1976), which, under the circumstances of that case, equated the "effect" part of the Section 5 test with "retrogression." But neither Beer nor any other case has ever suggested that the "purpose" test of Section 5 is inapplicable in the absence of retrogression.

Such a construction would render the purpose test completely meaningless.

Accordingly, the sole issue here is whether a state can satisfy Section 5 with a reapportionment scheme where the evidence shows, and a district court finds, that the reapportionment was enacted with the purpose of discriminating on the basis of race. The resolution of the issue should be obvious since this Court has repeatedly held that racially motivated state action is impermissible. Rogers v. Lodge, ___ U.S.___, 102 S. Ct. 3272 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980).

Indeed, this Court had held, without dissent, that the purpose issue under Section 5 is wholly distinct from the non-retrogression effect test. City of Richmond v. United States, 422 U.S. 358, 378-79 (1975).[1]

1 While Justices Brennan, Douglas and Marshall dissented, they did not disagree with this aspect of the decision.

Where a state acts with the purpose of discriminating on the basis of race, its action is illegal regardless of whether the position of minorities is enhanced, deprecated or merely unchanged. Thus, the annexation at issue in City of Richmond v. United States, supra, achieved a "perfectly legal result," but would still be invalid if it had been undertaken in order to discriminate. 422 U.S. at 378.

> An official action, whether an annexation or otherwise, taken for the purpose of discrimination against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs. . . . An annexation proved to be of this kind and not provided to have a justifiable basis is forbidden by §5, whatever its actual effect may have been or may be. 422 U.S. at 378.

It is frivolous for the State to argue that purposeful discrimination is permissible,

in the context of voting or in any other context, whether under the Constitution or under Section 5.[2] In denying the State of Georgia declaratory relief, the district court properly applied this Court's decisions concerning purposeful discrimination. The court made extensive findings on the voluminous evidence and found that the State of Georgia had a long and continuous

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2 In attempting to find some factual distinction between this case and prior decisions of this Court, Appellants assert that this Court has never invalidated any law, under the Constitution or under Section 5, which actually enhanced the right to vote. To the contrary, however, this Court invalidated in Rogers v. Lodge, supra, an at-large election scheme that, when adopted, enhanced the ability of blacks to participate in the political process. Before at-large voting was adopted Burke County, the county's commissioners had been appointed by the grand jury from which blacks were completely excluded. The adoption of any voting scheme inevitably increased their political impact, but that did not insulate that law from constitutional attack. See, Ga. Laws of 1873, p. 226; Ga. Laws of 1911, p. 390.

history of discriminating against black voters in the Fifth District (J.S.A. 5-7); that the Chairman of the House Reapportionment Committee, Joe Mack Wilson, exercised tremendous control over Act No. 5, that he was a racist, and that he did everything within his power to minimize the possibility of electing a black to Congress from the Fifth District (J.S.A. 8-9, 13-14, 33-39); that various announced, neutral goals were "a pretext for splitting the cohesive black community in the greater Atlanta area of South Fulton and DeKalb Counties" (J.S.A. 12); that blacks were excluded because of their race from the powerful House-Senate conference committees that created Act No. 5 (J.S.A. 28-33); that race was the sole issue that was considered by the legislators in drawing the Fourth and Fifth Congressional Districts (J.S.A. 31, 34, 41); that Act No. 5 made it very unlikely that a black would be

elected to Congress because no district had a majority of black voters and since racially polarized voting prevailed and had actually increased in past years (J.S.A. 3, 5, 9, 16, 37, 40-43); and that the State's two key witnesses at trial, the House and Senate Reapportionment Committee Chairmen Wilson and Hudson, were "discredited as untrustworthy." (J.S.A. 42)

The court concluded that:

> The only reason the Georgia General Assembly failed to enlarge the black population in the Fifth District more than it did and failed to unite black neighborhoods was solely because the population was of the black race.
>
> There was no legitimate, nondiscriminatory reason why the Fifth District was drawn the way it was. (J.S.A. 41)

Based on its conclusion that the evidence "demonstrates no legitimate non-racial reason for adoption of a Fifth District which split a cohesive black community" (J.S.A. 46), and based on vast evidence

of intentional discrimination, the Court concluded that "Act No. 5 as it pertains to the Fourth and Fifth Congressional Districts has a discriminatory purpose in violation of Section 5." (J.S.A. 47)

Appellants do not specifically challenge any finding of fact in this case, nor could they in light of the truly overwhelming evidence of intentional discrimination that was presented to the trial court.

Lacking support in either law or fact, Appellants seeks to obfuscate the issue in the case by claiming that the district court, in effect, required them to "maximize" the percentage of blacks in the Fifth District, and to give blacks an advantage. (J.S. 24-26) To make this argument, the State has to ignore the lower court's explicit holding:

> The Court's decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area. . . . The

> State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as racially discriminatory purpose is absent from the process. Act No. 5 is being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to the extent possible; the plan drawing process was not free of racially discriminatory purpose. (J.S.A. 48-49)

Clearly, neither the District Court, the United States, nor the Intervenors ever sought to coerce the State to maximize the percentage of blacks in any district. The State was denied declaratory relief not because of what they failed to do, but because they intentionally drew the district line between the Fourth and Fifth Districts for the specific and sole purpose of splitting a cohesive black community in order to minimize the likelihood that a black could be elected to Congress from the

State of Georgia. Such purposeful discrimination is illegal under Section 5.

II.

IN THE ABSENCE OF ANY SHOWING BY THE STATE OF GEORGIA THAT ACT NO. 5 GAVE BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS, THE STATE WAS NOT ENTITLED TO A DECLARATORY JUDGMENT UNDER THE "EFFECT TEST" OF SECTION 5, AS AMENDED IN 1982

In Beer v. United States, supra, this Court limited the effect test of Section 5 to cases of retrogression. In City of Mobile v. Bolden, supra, a plurality of this Court concluded that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, was limited to cases of intentional discrimination. When Congress extended and amended the Voting Rights Act in 1982, Congress changed the statutes for the specific purpose of overturning both of these decisions.

Section 2 was amended to make it clear that voting practices would be unlawful if they "resulted in" discrimination, regardless of purpose. S. Rep. No. 417, 97th Cong., 2nd Sess. 27-30 (1982) [hereinafter, "Senate Report"]; H. Rep. No. 227, 97th Cong., 1st Sess. 28-32 (1981) [hereinafter, "House Report"]. In determining whether a challenged electoral practice results in discrimination, Congress indicated a variety of evidentiary factors that could be considered by a court in determining whether blacks had equal access to the political process. Senate Report at 28-29; House Report at 30.

In amending Section 2 to encompass electoral practices that result in discrimination, regardless of purpose, Congress also intended to have the new Section 2 standard apply in Section 5 determinations. As the Senate expressly stated:

> In light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2.
> (Senate Report at 12, n. 21.)

Thus, a reapportionment plan, or any other voting change, may not receive Section 5 approval where the State fails to prove that minority members in the jurisdiction would have equal access to the political process under the new law. Pre-clearance of the new law must be denied where the State fails to make this showing, even if there is no finding of intentional discrimination, and even where there is no retrogression.

The plaintiffs failed to provide any evidence that would entitle them to a declaratory judgment pre-clearing Act No. 5 under the expanded definition of "effect" in Section 5 that Congress adopted in 1982.

The district court did not rest its decision on this theory under the amended Voting Rights Act because the proof of purpose was so clear. This is an alternative basis upon which the district court's judgment should be affirmed.

Although Appellants assert that blacks have equal access to the political process under Act No. 5, they made no such showing at trial. Noting that the Senate and House Reports indicate that the historical presence of voting discrimination is relevant to determining whether blacks have full access to the political process, the State asserts that there have been no official barriers to voting by blacks since 1946. (J.S. 19) That is not true. In fact, elimination of the literacy test in 1965 resulted in increased voter registration in the Atlanta area that even exceeded, percentagewise, the increase in many rural areas in Georgia.

(Exhibit I.D. TTT; T. 155) The evidence is undisputed that, as recently as 1972, local election officials ignored Section 5 in erecting a variety of barriers to deter black voters and candidates from office; that polling locations were changed shortly before Andrew Young's congressional race in 1972; that voters were not notified of their new polling locations; and that election districts were redrawn in a thoroughly confusing fashion to make voting as difficult as possible for many black residents. (T. 675-77) The Fifth District itself was also intentionally gerrymandered during the last reapportionment, in 1971 and 1972, to make it difficult for blacks to be elected. (J.S.A. 7-8)

Plaintiffs also assert that a black could be elected in the Fifth Congressional District under Act No. 5, but the evidence is clearly to the contrary. Although one

black person has been elected to the Fifth Congressional District since Reconstruction, the evidence is uncontested that that would be extremely unlikely to reoccur under Act No. 5. As the district court found, members of the legislature believe that the district would have to have a 65% black population in order to provide black candidates with a reasonable possibility of winning. (J.S.A. 42-43). Racial block voting has been increasing in the Atlanta metropolitan area over the past ten years (J.S.A. 5), and the State's expert witness, Dr. Bullock, failed to present any credible evidence whatsoever that a black person could prevail under Act No. 5. Bullock's methodology substantially overpredicts the percentage of whites who vote for black candidates. (T. 271-80; Exhibits I.D. AAAA, BBBB)

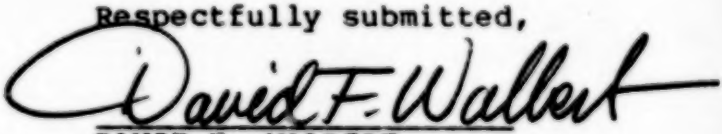
Because the State failed to present any evidence that blacks would enjoy equal

access to the political process under Act No. 5, they were not entitled to a declaratory judgment under Section 5 of the Voting Rights Act, as amended.

CONCLUSION

For the reasons stated above, Intervenor-Appellees respectfully request that this Court summarily affirm the judgment of the district court without the necessity of any further argument since no substantial question of any sort has been presented in Appellants' jurisdictional statement.

Respectfully submitted,



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